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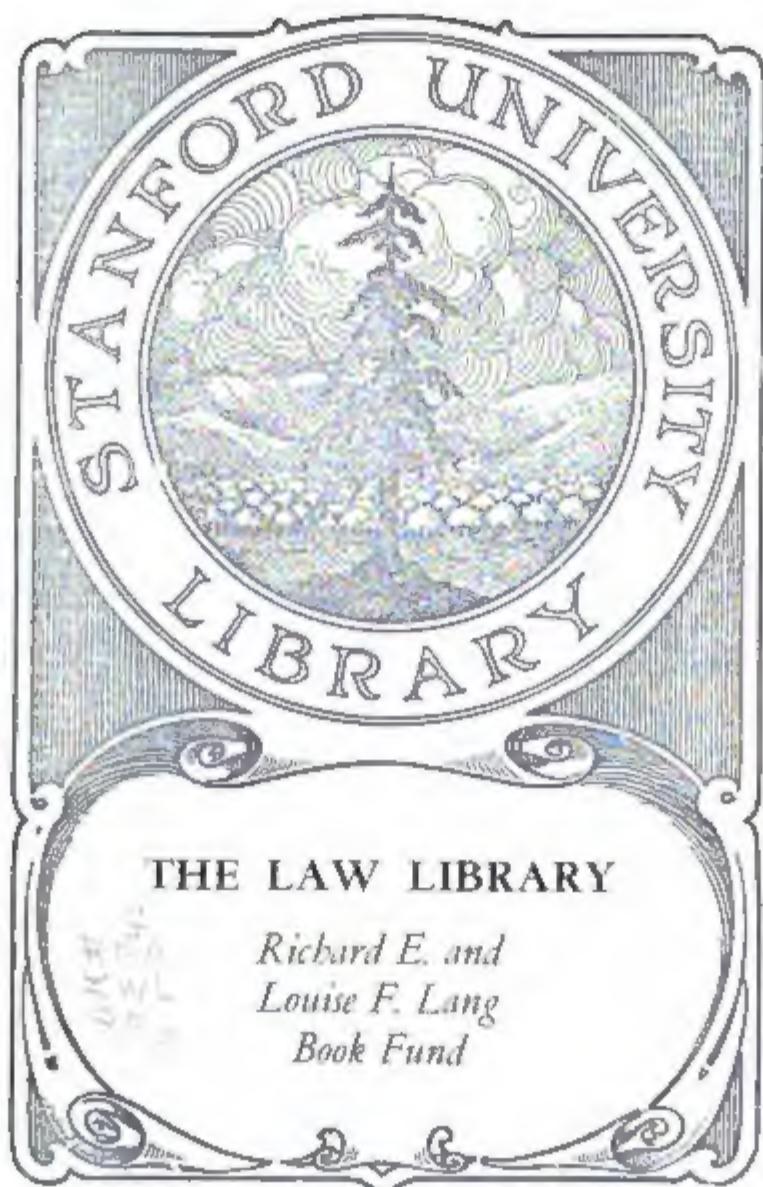
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*Frank J. Board*

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1828

# DIGEST

OF THE

## DECISIONS OF THE SUPREME COURT

¶

OF

## THE UNITED STATES,

FROM ITS

ESTABLISHMENT IN 1789, TO FEBRUARY TERM, 1820.

INCLUDING

## THE CASES

DECIDED IN THE

## CONTINENTAL COURT OF APPEALS

IN

## PRIZE CAUSES,

DURING THE WAR OF THE REVOLUTION.

---

BY HENRY WHEATON,

Counsellor at Law, and Reporter of the Decisions of the Supreme Court.

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NEW-YORK:

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.....

1821.

*Southern District of New-York, ss:*

BE IT REMEMBERED, that on the first day of August, in the forty-fifth year of the Independence of the United States of America, HENRY WHEATON, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words and figures following, to wit:

"A Digest of the Decisions of the Supreme Court of the United States, from its establishment in the year 1789, to February term, 1820. Including the Cases decided in the Continental Courts of Appeals in Prize Causes during the war of the Revolution. By Henry Wheaton, Counsellor at Law, and Reporter of the Decisions of the Supreme Court."

In conformity to the act of Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also, to an act, entitled, "An act supplementary to an act, entitled, an act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

GILBERT LIVINGSTON THOMPSON,  
Clerk of the Southern District of New-York.

## ADVERTISEMENT.

In compiling this Digest, which it is hoped may be useful to the profession, the Editor has endeavoured to abstract the points decided, as nearly as possible, in the very words used by the Court in delivering its judgment. Wherever this plan has been departed from, it has been in order to give the leading principles determined in a more condensed and concise form. By referring to the Table of Contents at the beginning, the learned reader will be able readily to find what he is in search of.

An Appendix has been added, containing some of the most important Acts of Congress expounded or commented on by the Court, with a reference to the Titles of the Digest where the exposition or commentary is to be found, which it was thought would facilitate the examination of the adjudications upon these statutes in the hurry of a trial, or on other occasions where a ready access could not be had to them.

A List of the Cases cited, with a reference to the original Reports, where they are to be found at large, closes the work, which the Editor commits to the candour and indulgence of his professional brethren.



**JUDGES**  
**OF THE**  
**SUPREME COURT OF THE UNITED STATES,**  
**FROM THE TIME OF ITS FIRST ESTABLISHMENT.**



The Hon. JOHN JAY, Chief Justice—appointed, September 26, 1789.  
The Hon. WILLIAM CUSHING, Associate Justice—September 27, 1789.  
The Hon. JAMES WILSON, Associate Justice—September 29, 1789.  
The Hon. JOHN BLAIR, Associate Justice—September 30, 1789.  
The Hon. JAMES IREDELL, Associate Justice—February 10, 1790.  
The Hon. THOMAS JOHNSON, Associate Justice—November 7, 1791.  
The Hon. WILLIAM PATERSON,\* Associate Justice—March 4, 1793.  
The Hon. JOHN RUTLEDGE,† Chief Justice—July 1, 1795.

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\* Appointed in the place of Mr Justice Johnson, resigned.

† Appointed in the place of Mr. Chief Justice JAY, resigned.

- The Hon. SAMUEL CHASE,\* Associate Justice—January 27, 1796.**
- The Hon. OLIVER ELLSWORTH,† Chief Justice—March 4, 1796.**
- The Hon. BUSHROD WASHINGTON,‡ Associate Justice, December 20, 1798.**
- The Hon. ALFRED MOORE,§ Associate Justice—December 10, 1799.**
- The Hon. JOHN MARSHALL,|| Chief Justice—January 31, 1801.**
- The Hon. WILLIAM JOHNSON,¶ Associate Justice—March 1, 1804.**
- The Hon. BROCKHOLST LIVINGSTON,\*\* Associate Justice.**
- The Hon. THOMAS TODD,†† Associate Justice—March, 1807.**
- The Hon. GABRIEL DUVALL,†† Associate Justice—November 18, 1811.**
- The Hon. JOSEPH STORY,§§ Associate Justice—November 18, 1811.**

\* Appointed in the place of Mr. Justice BLAIR.

† Appointed in the place of Mr. Chief Justice RUTLEDGE, deceased.

‡ Appointed in the place of Mr. Justice WILSON, deceased.

§ Appointed in the place of Mr. Justice IREDELL, deceased.

|| Appointed in the place of Mr. Chief Justice ELLSWORTH, resigned.

¶ Appointed in the place of Mr. Justice MOORE, resigned.

\*\* Appointed in the place of Mr. Justice PATERSON, deceased.

†† Appointed under the act of Congress of the 24th of February, 1807, providing for the appointment of an additional Judge.

†† Appointed in the place of Mr. Justice CHASE, deceased.

§§ Appointed in the place of Mr. Justice CUSHING, deceased.

# RULES AND ORDERS

OF THE

## SUPREME COURT OF THE UNITED STATES



### I.

*February Term, 1790.*

**Ordered,** That the Clerk of this Court do reside and keep his office at the seat of the national government, and that he do not practice, either as an attorney or a counsellor, in this Court, while he shall continue to be Clerk of the same.

### II.

*February Term, 1790.*

~~Ordered,~~ That (until farther order) it be requisite to the admission of attorneys, or counsellors, to practice in this Court, that they shall have been such for three years past in the Supreme Courts of the State to which they respectively belong, and that their private and professional characters shall appear to be fair.

### III.

*February Term, 1790.*

**Ordered,** That counsellors shall not practice as attorneys, nor attorneys as counsellors, in this Court.

## IV.

*February Term, 1790.*

**Ordered,** That they shall respectively take the following oath, viz. I, do solemnly swear, that I will demean myself (as an attorney or counsellor of the Court) uprightly, and according to law, and that I will support the Constitution of the United States.

## V.

*February Term, 1790.*

**Ordered,** That (unless and until it shall be otherwise provided by law) all process in this Court shall be in the name of the President of the United States.

## VI.

*February Term, 1791.*

**Ordered,** That the counsellors and attorneys admitted to practice in this Court, shall take either an oath, or, in proper cases, an affirmation, of the tenor prescribed by the rule of this Court on this subject, made February term, 1790. viz. I

do solemnly swear, (or affirm, as the case may be,) that I will demean myself, as attorney or counsellor of this Court, uprightly, and according to law, and that I will support the constitution of the United States.

## VII.

*August Term, 1791.*

The Chief Justice, in answer to the motion of the Attorney-General, informs him and the Mar, that this Court consider the practice of the Court of King's Bench, and of Chancery, in England, as affording outlines for the practice of this Court; and that

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they will, from time to time, make such alterations therein as circumstances may render necessary.

### VIII.

*February Term, 1795.*

*The Court* give notice to the gentlemen of the bar, that hereafter they will expect to be furnished with a statement of the material points of the case, from the counsel on each side of the cause.

### IX.

*February Term, 1795.*

*The Court* declared, that all evidence on motions for a discharge upon bail, must be by way of deposition, and not *viva voce*.

### X.

*August Term, 1796.*

*Ordered,* That process of subpoena, issuing out of this Court in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and farther, that if the defendant, on such service of the subpoena, should not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

### XI.

*February Term, 1797.*

*It is ordered* by the ~~Court~~, that the Clerk of the Court to which any writ of error shall be directed, may make return of the same by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the Court.

**RULES OF COURT.****XII.***August Term, 1797.*

*It is ordered* by the Court, that no record of the Court be suffered by the clerk to be taken out of his office but by the consent of the Court; otherwise to be responsible for it.

**XIII.***August Term, 1800.*

*Ordered*, That the plaintiff in error be at liberty to show, to the satisfaction of this Court, that the matter in dispute exceeds the sum or value of 2,000 dollars, exclusive of costs; this to be made appear by affidavit, and                    days notice to the opposite party, or their counsel. Rule as to affidavits to be mutual.

**XIV.***August Term, 1801.*

*Ordered*, That counsellors may be admitted as attorneys in this Court, on taking the usual oath.

**XV.***August Term, 1801.*

*It is ordered*, That in every cause when the defendant in error fails to appear, the plaintiff may proceed *ex parte*.

**XVI.***February Term, 1803.*

*It is ordered*, That where the writ of error issues within thirty days before the meeting of the Court, the defendant is at liberty to enter his appearance, and proceed to trial; otherwise the cause must be continued.

## XVII.

*February Term, 1803.*

In all cases where a writ of error shall delay the proceedings on the judgment of the Circuit Court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per centum per annum, on the amount of the judgment.

## XVIII.

*February Term, 1803.*

In such cases where there exists a real controversy, the damages shall be only at the rate of six per centum per annum. In both cases the interest is to be computed as part of the damages.

## XIX.

*February Term, 1803.*

All causes, the records of which shall be delivered to the clerk on or before the sixth day of the term, shall be considered as for trial in the course of that term. Where the record shall be delivered after the sixth day of the term, either party will be entitled to a continuance.

## XX.

*February Term, 1806.*

In all cases where a writ of error shall be a *supersedeas* to a judgment, rendered in any Court of the United States, (except that for the District of Columbia,) at least thirty days previous to the commencement of any term of this Court, it shall be the duty of the plaintiff in error to lodge a copy of the record with the Clerk of this Court, within the first six days of the term, and if he shall fail so to do, the defendant in error shall be permitted, afterwards, to lodge a copy of the record with the Clerk, and the cause shall stand for trial in like manner as if the record had come

**RULES OF COURT.**

up within the first six days ; or he may, on producing a certificate from the Clerk, stating the cause, and that a writ of error has been sued out, which operates as a *supersedeas* to the judgment, have the said writ of error docketed and dismissed. This rule shall apply to all judgments rendered by the Court for the District of Columbia, at any time prior to a session of this Court.

**XXI.**

*February Term, 1806.*

In cases not put to issue at the August term, it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the Court below, to assign them in this Court, at the commencement of the term, or so soon thereafter as the record shall be filed with the clerk, and the cause placed on the docket ; and if he shall fail to do so, and shall also fail to assign them when the cause shall be called for trial, the writ of error may be dismissed at his cost ; and if the defendant shall refuse to plead to issue, and the cause shall be called for trial, the Court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause.

**XXII.**

*February Term, 1808.*

*Ordered,* That all parties in this Court, not being residents of the United States, shall give security for the costs accruing in this Court, to be entered on the record.

**XXIII.**

*February Term, 1808.*

*Ordered,* That upon the Clerk of this Court producing satisfactory evidence by affidavit, or the acknowledgment of the parties, or their sureties, of having served a copy of the bill of costs, due by them respectively in this Court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively, to compel payment of the said costs.

## XXIV.

*February Term, 1810.*

**Ordered,** That upon the reversal of a judgment or decree of the Circuit Court, the party in whose favour the reversal is, shall recover his costs in the Circuit Court.

## XXV.

*February Term, 1812.*

**Ordered,** That only two counsel be permitted to argue for each party, plaintiff and defendant, in a cause.

## XXVI.

*February Term, 1812.*

There having been two associate justices of the Court appointed since its last session; *It is Ordered,* That the following allotment be made of the Chief Justice, and of the Associate Justices of the said Supreme Court among the Circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered or ordered, viz.

For the first Circuit—The Honourable Joseph Story. For the second Circuit—The Honourable Brockholst Livingston. For the third Circuit—The Honourable Bushrod Washington. For the fourth Circuit—The Honourable Gabriel Duvall. For the fifth Circuit—The Honourable John Marshall, Ch. J. For the sixth Circuit—The Honourable William Johnson. For the seventh Circuit—The Honourable Thomas Todd.

## XXVII.

*February Term, 1816.*

*It is Ordered* by the Court, That in all cases where farther proof is ordered by the Court, the depositions which shall be

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taken, shall be by a commission to be issued from this Court, or from any Circuit Court of the United States.

**XXVIII.**

*February Term, 1817.*

Whenever it shall be necessary or proper, in the opinion of the presiding judge in any Circuit Court, or District Court, exercising Circuit Court jurisdiction, that original papers of any kind should be inspected in the Supreme Court upon appeal, such presiding judge may make such rule or order for the safe keeping, transporting, and return of such original papers, as to him may seem proper, and this Court will receive and consider such original papers in connection with the transcript of the proceedings.

**XXIX.**

*February Term, 1817.*

In all cases of Admiralty and Maritime Jurisdiction, where new evidence shall be admissible in this Court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this Court, or from any Circuit Court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories within twenty days from the service of such notice. Provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open Court, in cases where by law it is admissible.

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DIGEST  
or  
THE DECISIONS  
OF THE  
SUPREME COURT OF THE UNITED STATES.

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ADMIRALTY.

- I. *Civil Jurisdiction of the Admiralty.*
- II. *Revenue Seizures.*
- III. *Admiralty Practice.*
- IV. *Criminal Jurisdiction of the Admiralty.*

ADMIRALTY I.

*Civil Jurisdiction of the Admiralty.*

1. Where property has been captured as prize, no action lies at common law, before adjudication, to recover the same from any person in whose hands it is; but the cause is exclusively of Admiralty jurisdiction. *Bingham v. Cabot*, 3 Dall. 19.
2. Questions of prize or no prize are exclusively of Admiralty jurisdiction. *Ib.*
3. An Admiralty Court has jurisdiction to sustain a libel to carry into effect the decree of another Admiralty Court. *Pen-hallow v. Doane*, 3 Dall. 54.
4. The decree of a Court of Admiralty, *in rem*, is conclusive

upon all the world ; and it seems that in a suit in another Court of Admiralty to carry it into effect, the grounds of such decree cannot be inquired into, nor any irregularity in the exercise of its jurisdiction noticed. *Ib.*

5. The trial of ships, captured as prize without the jurisdiction of any particular country, belongs exclusively to the Courts of the capturing power, where the ship is brought within its dominions ; and all questions incident thereto are exclusively cognizable in the same Courts, and cannot be inquired into by any other tribunals. *United States v. Peters*, 3 *Dall.* 121. *Talbot v. Jansen*, 3 *Dall.* 133.

6. Nor are the captors in such case amenable to any other tribunal, nor liable to be arrested for such seizure as prize, whether the captured ship be belligerent or neutral. *Ib.* *L'Invincible*, 1 *Wheat.* 238.

7. Nor will the coming of the capturing or captured ship within the dominions of a neutral country, entitle its Courts to jurisdiction. *Ib.*

8. In captures between belligerents, the captors, immediately on a capture, acquire such a right as no neutral nation can justly impugn or destroy ; and, therefore, on a libel for salvage in the Courts of a neutral nation, that right will be respected in distributing the residue, even where the prize had been found abandoned at sea. *M'Donnough and Dallery v. The Mary Ford*, 3 *Dall.* 188.

9. A libel for a forfeiture for exportation of arms, &c. contrary to the act of the 22d of May, 1794, c. 33. is a civil cause of admiralty and maritime jurisdiction, and the process is of the nature of a libel *in rem*. *The United States v. La Vengeance*, 3 *Dall.* 297.

10. It need not appear expressly in terms that the case is a water transaction, to bring it within the Admiralty jurisdiction. It is sufficient if it appear by reasonable implication. *Ib.*

11. A mere replacement of her force by a French privateer undergoing repairs, under the protection of the 19th article of the French treaty of 1778, is not such a material augmentation

of force, as can be deemed a sufficient cause for the restitution of a prize captured by her. *Moodie v. The Phœbe Ann*, 3 *Dall.* 319.

12. A libel for a forfeiture under the slave trade act of the 22d of March, 1794, c. 11. is a cause of admiralty and maritime jurisdiction. *United States v. The Sally of Norfolk*, 2 *Cranck*, 406.

13. Courts of Admiralty possess, in virtue of their general jurisdiction, the power to decree a sale of a ship and cargo in their custody. It is an incident to the possession of the cause. *Jennings v. Carson*, 4 *Cranck*, 2.

14. The District Courts of the United States are Courts of Admiralty, and as no law has regulated their practice, they proceed according to the general rules of the Admiralty. *Ib.*

15. A bottomry bond, made by the master, vests no absolute indefeasible interest in the ship, but gives a claim upon her which may be enforced in the admiralty. *Blaine v. The Charles Carter*, 4 *Cranck*, 328.

16. In the case of bottomry bond, executed by an owner in the place of his residence, the same reason does not exist for giving an implied Admiralty claim; for the owner may execute an express mortgage. *Ib.*

17. There is strong reason to contend, that the claim of bottomry interest shall be preferred to every other for the voyage on which the bottomry is founded, except seamen's wages. *Ib.*

18. If the owner of a bottomry bond suffer the ship to make several voyages without asserting his lien, and executions are levied on the ship by other creditors, the right to enforce the bottomry bond on the ship is gone by such laches. *Ib.*

19. All seizures, under laws of impost, navigation or trade of the United States, where the seizures are made in waters navigable from the sea by vessels of ten or more tons burthen, are civil causes of admiralty and maritime jurisdiction; and under the judiciary act of 24th of September, 1789, c. 20. are triable without a jury. *United States v. The Betsey*, &c. 4 *Cranck*, 443. *Whelan v. United States*, 7 *Cranck*, 112.

20. It is the place of seizure, and not of committing the offence, that decides the jurisdiction, by the act of 1789, c. 20. *United States v. The Betsey*, 4 *Cranch*, 443. *Keene v. United States*; 5 *Cranch*, 304. *The Ann*, 9 *Cranch*, 289.

21. If a seizure for a municipal forfeiture be within the territorial jurisdiction of a foreign power, the Admiralty may proceed on such seizure, and enforce the forfeiture; for the violation of the foreign territorial jurisdiction is merely a question between the governments. *The Richmond v. United States*, 9 *Cranch*, 71.

22. In order to institute and perfect proceedings *in rem*, in the Admiralty, the thing should be actually or constructively within the reach of the Court. It is actually within its possession when it is submitted to the process of the Court; it is constructively so when by a seizure it is held to ascertain and enforce a right of forfeiture, which can alone be decided by a judicial decree *in rem*. *The Ann*, 9 *Cranch*, 289.

23. Under the judiciary act of the 24th of September, 1789, c. 20. the Admiralty jurisdiction of the District Courts, in cases of seizures for forfeitures, does not attach until after a seizure made; for it is the seizure which decides the forum of trial. If so, there must be a good subsisting seizure at the time when the libel is filed. If the seizure be explicitly abandoned, and the property be restored by the party who made the seizure; before any proceedings had, all rights under the seizure are gone. Although judicial jurisdiction once attached, it is devested by such abandonment, and cannot be reinstated but by a new seizure. *Ib.*

24. But a tortious ouster of possession, or fraudulent rescue, or fraudulent relinquishment, after a seizure, will not (it seems) devest jurisdiction. *Ib.*

25. Material men and others who furnish supplies to a foreign ship, have a lien on the ship, and may proceed in the Admiralty to enforce that lien. *The Aurora*, 1 *Wheat.* 96.

26. The question, whether a seizure for a forfeiture, under the laws of the United States, is rightful or not, cannot be decided in any State Court, but belongs exclusively to the Admiralty

Courts of the United States; and their decrees are final on the question. *Slocum v. Mayberry*, 2 Wheat. 1. *Gelston v. Hoyt*, 3 Wheat. 246.

27. When a seizure is made for a forfeiture, no State authority has a right to interfere or take possession of the thing seized, and prevent the exercise of exclusive jurisdiction by the Courts of the United States. *Slocum v. Mayberry*, 2 Wheat. 1.

28. No replevin, or other State process, lies to take property so seized out of the custody of the seizing officer, or of the Court having cognizance of the cause; and if the property be wrongfully withdrawn, the Federal Court may enforce a redelivery of it by attachment, or other summary process, against the parties who shall devest the possession. *Ib.*

29. If after a revenue seizure the seizing officer refuse to institute proceedings to ascertain the forfeiture, the Court having cognizance of the cause may compel the officer to proceed to adjudication, or to abandon the seizure. *Ib.*

30. If a seizure be wrongful, the party injured may, at his election, sue for damages at common law after the Admiralty proceedings are ended; or may proceed by libel or claim in the Admiralty for damages for the illegal seizure. *Ib.*

31. Where a case of civil salvage has occurred, and the cargo been sold by order of Court, after the salvage claim is determined, the owners of the ship, if they have a claim for general average or freight against the proceeds, may apply to the Court by libel and petition, and have the claim adjudicated, and the proceeds held liable therefor. *The Sybil*, 4 Wheat. 98.

32. The Admiralty possesses a general jurisdiction in cases of suits by material men *in rem* and *in personam*. *The General Smith*, 4 Wheat. 438.

33. A suit *in personam* is always maintainable. But where the proceeding is *in rem*, to enforce a specific lien for material men, it is incumbent on the plaintiff to establish the existence of such lien in the particular case. *Ib.*

34. Where repairs have been made, or necessaries furnished to a *foreign ship*, or to a ship in the ports of a State to which she

## ADMIRALTY.

does not belong, the general maritime law gives a lien on the ship as security, and the party may maintain a suit in the Admiralty to enforce his right. *Ib.*

35. But as to repairs and necessaries in the port or State to which the ship belongs, the case is governed altogether by the local law of the State, and no lien is implied, unless by that law. But if the local law gives a lien, it may be enforced in the Admiralty. *Ib.*

36. By the common law, material men furnishing repairs to a domestic ship, have no particular lien on the ship for their demands. *Ib.*

37. This is also the case in Maryland; and, therefore, no suit *in rem* lies in the Admiralty in that State to sustain a claim against the ship by material men. *Ib.*

38. But they might there maintain a suit *in personam* in the Admiralty. *Ib.*

39. A shipwright, who takes a ship in possession to repair it, is not bound to part with the possession until paid for the repairs; but if he parts with the possession of a domestic ship, or works upon it without taking possession, he has no lien upon the ship for his pay. *Ib.*

## ADMIRALTY II.

### *Revenue Seizures.*

40. In a prosecution in the Admiralty, against a vessel, for a violation of the laws of the United States, it is not necessary to adduce positive evidence of the identity of the vessel, if there be strong circumstances justifying the presumption. *The Jane v. United States, 7 Cranch, 363.*

41. In a libel for a seizure, it is not necessary to state any fact, which constitutes the defence of the claimant, or a ground of exception to the operation of a law on which the libel is founded. *The Aurora v. United States, 7 Cranch, 382.*

42. An information in the Admiralty, for a forfeiture, must

contain a substantial statement of the offence. A general reference to the provisions of a statute is not sufficient. If the information be defective in these respects, the defect is not cured by evidence of the facts which ought to have been averred, for the decree must be according to the *allegations*, as well as the proofs. *The Hoppel v. United States*, 7 Cranch, 389. *The Caroline v. United States*, 7 Cranch, 496. *The Samuel*, 1 Wheat. 9.

43. But technical niceties of the common law, as to informations, which are not important in themselves, and stand only on precedents, are not regarded in admiralty informations. *The Hoppel v. United States*, 7 Cranch, 389. *The Samuel*, 1 Wheat. 9.

44. It is sufficient if the offence be so set forth in the information, that if true, the case is within the statute. *The Samuel*, 1 Wheat. 9.

45. A party who offers an excuse for a violation of a statute, upon which a seizure has been made for a forfeiture in the Admiralty, must make out the *vis major*, under which he shelters himself, so as to leave no reasonable doubt of his innocence. Circumstances will sometimes outweigh positive testimony. *The Struggle v. United States*, 9 Cranch, 71.

46. Where, in an Admiralty cause, on a seizure, the evidence is so contradictory or ambiguous, that the Supreme Court finds a decision difficult, it will order the cause to farther proof. *The Samuel*, 1 Wheat. 9.

47. A libel on a seizure in the Admiralty, in its terms and in its essence, is an information; and the word "information" is not exclusively applicable to common law proceedings. *Ib.*

48. In revenue, or *lascasse* causes, the Circuit Court may, upon appeal, allow the introduction of a new allegation into the information, by way of amendment. *The Edward*, 1 Wheat. 261.

49. Where, in a seizure cause, the property was delivered on bail, on appraisement, and the decree condemning it was affirmed by the Supreme Court, it was ordered, that damages should be allowed at the rate of six per cent. on the amount of the appraised value of the property, beginning the interest from the

date of the decree of condemnation in the District Court. *The Diana, 3 Wheat. 58.*

50. In a seizure revenue cause, a witness offered to be examined, *viva voce*, in the Supreme Court, was ordered to have his deposition taken under a commission out of Court. *The Samuel, 3 Wheat. 77.*

51. Where a cause was ordered to farther proof, and on the farther proof restitution was decreed in a seizure cause, the Supreme Court ordered a certificate of probable cause of seizure. *The San Pedro, 3 Wheat. 78.*

## ADMIRALTY III.

*Admiralty Practice.*

52. An Admiralty suit being *in rem*, is not abated by the death of one of the parties. *Penhallow v. Doane, 3 Dall. 54.*

53. If there be a joint Admiralty suit against several persons, yet the decree may, if equity require it, be against them severally, or the damages be apportioned. *Ib.*

54. An appeal from the decree of a Court in an Admiralty suit, suspends the operation of the decree. *Ib.*

55. On appeals in Admiralty causes, the decree will not be examined, unless so far as respects the party appealing. *M'Donough v. Dannery, 3 Dall. 188.*

56. A prize agent who sells a captured cargo after notice of a libel pending for restitution, is answerable for the proceeds received by him, but no farther; although he has, after such notice, paid over such proceeds to the captors. *Hills v. Ross, 3 Dall. 331.*

57. Where, in an Admiralty suit instituted against partners, one entitles his plea for all the partners, and the proctor appears for all of them, this is a sufficient appearance of all the partners. *Ib.*

58. The right of seizing and bringing in a vessel for farther examination, does not authorize or excuse any spoliation or damage done to the property; but the captors proceed at their

peril, and are liable for all the consequent injury and loss. *Del Col v. Arnold*, 3 *Dall.* 323.

59. The owners of privateers are responsible for the conduct of their agents; the officers and crew of the privateer, to all the world; and the measure of that responsibility is the full value of the property injured or destroyed. *Ib.*

60. *Quære*, Whether other prize property captured by the same captors may be attached in the Admiralty, to secure an indemnity for injuries by a privateer? At all events, the irregularity, if any, is cared by the consent of the captors, that such prize property may be sold, and the proceeds applied to that purpose. *Ib.*

61. On a libel for an illegal seizure on the high seas, if damages be awarded in the Circuit Court, on an account taken there, and it be not exceptionable on its face, and has not been excepted to by counsel before that Court, the Supreme Court will not receive any objection to it. *Little v. Barrene*, 2 *Cranch*, 170.

62. *Quære*, Whether probable cause will excuse a seizure, on the high seas, for a municipal forfeiture? *Ib.*

63. A libel may be maintained in the Admiralty for damages for an illegal seizure at sea: and it is no excuse for restitution in value, that after such seizure, the vessel was taken by a superior force out of the seizer's possession; for the owner is not bound to resort to the recaptors, but may abandon, and hold the original seizers liable for the whole loss. *Maley v. Shattuck*, 3 *Cranch*, 458.

64. In estimating damages in such a case, the premium of insurance, if any is paid, is a proper item of charge, but not otherwise. So, the outfit of the vessel, and advance wages paid to the crew. *Ib.*

65. In all proceedings *in rem*, the Admiralty has a right to order the thing to be taken into the custody of the law, and it is to be presumed to be in the custody of the law, unless the contrary appears. *Jennings v. Carson*, 4 *Cranch*, 2.

66. By the practice of the Admiralty, a vessel, when libelled, is placed under the absolute control of the Court. *Ib.*

forfeiture to the government, and if the government adopt his seizure, and the property be condemned, he is justified; otherwise not. *Hoyt v. Gelston*, 3 Wheat. 246.

84. An information for a forfeiture, under the statute of neutrality of 1794, c. 50. need not state the person or State by name against whom the ship was fitted out to cruise. *Ib.*

85. An information for a forfeiture should not only state the facts of forfeiture, but also state that thereby it became forfeited, and was seized as such. *Ib.*

86. On an illegal seizure, the original wrong doers may be made responsible beyond the loss actually sustained in a case of gross and wanton outrage; but the owners of the privateer, who are only constructively liable, are not bound to the extent of vindictive damages. *The Amiable Nancy*, 3 Wheat. 546.

87. If the cargo, in case of a tortious seizure, be deteriorated by any cause not occasioned by the fault of the seizers, it is not a subject of damages to be allowed to the libellant. *Ib.*

88. The probable profits of an unfinished voyage afford no rule to estimate damages in case of a marine trespass; and such an item is to be rejected. *The Amiable Nancy*, 3 Wheat. 546. *La Amistad de Rues*, 5 Wheat. 384.

89. The prime cost or value of the property lost, at the time of the loss, and in case of an injury merely, the diminution in value by reason of the injury, with interest upon the valuation, afford the true measure of estimating damages in cases of marine trespass. *The Amiable Nancy*, 3 Wheat. 546.

90. The commissions of a supercargo are not a proper item of loss in case of a marine trespass, if not lost by any act of the captors. *Ib.*

## ADMIRALTY IV.

*Criminal Jurisdiction of the Admiralty.*

91. It seems, that the 3d art. of the constitution, which declares, that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction," vests in the Courts of the United States exclusive jurisdiction of such cases, and that a murder committed where the tide ebbs and flows, though within the waters of a particular State of the Union, is a case of admiralty and maritime jurisdiction. *The United States v. Bewens*, 3 Wheat. 336. 386.

92. But Congress has not so exercised the power thus granted, as to confer on the Courts of the United States jurisdiction of such a murder. *Ib.*

93. A robbery committed on the high seas is piracy under the act of 1790, c. 36. s. 8. although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death; and the Courts of the United States have jurisdiction of such robbery and piracy. *The United States v. Palmer*, 3 Wheat. 310. 326.

94. The crime of robbery, committed by a person who is not a citizen of the United States, on the high seas, on board a vessel belonging exclusively to foreigners, is not piracy under the act of 1790, c. 36.; and is not punishable under that act in the Courts of the United States. *Ib.*

95. The Courts of the United States have no jurisdiction under the act of 1790, c. 36. of manslaughter, committed by the master upon one of the seamen, on board a merchant vessel of the United States, lying in the river Tigris, in the empire of China, 35 miles above its mouth, off Wampoa, about 100 miles from the shore, in four and a half fathoms water, and below low water mark; the 12th sec. of the act being confined to manslaughter on the high seas. *United States v. Wilberger*, 5 Wheat. 76. 93.

96. The act of 1790, c. 36. s. 8. extends to all persons, on

board all vessels, who throw off their allegiance by cruising piratically, and committing piracy on other vessels. *The United States v. Klintock*, 5 Wheat. 144. 149. *United States v. Furlong*, *Ib.* 152. 184. 182. *The United States v. Holmes*, *Ib.* 412. 416.

97. In such a case, where, by the evidence found on board, the vessel does not appear to be sailing under the authority of any particular nation, the burden of proof of the national character of the vessel is thrown on the prisoner. *Ib.*

98. Under the same act, if the offence be committed on board of a foreign vessel by a citizen of the United States; or on board a vessel of the United States by a foreigner; or by a citizen or foreigner on board a piratical vessel; the offence is equally cognizable by the Courts of the United States: And it makes no difference, whether the offence was committed on board of a vessel or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him when in the sea, though he was not thrown overboard. *The United States v. Holmes*, 5 Wheat. 412. 416.

99. A vessel lying in the open road-stead of a foreign country is upon "the high seas," within the act of 1790, c. 36. s. 8. *The United States v. Furlong*, 5 Wheat. 200.

100. The act of the 3d of March, 1819, c. 76. s. 35. which provides, "that if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, as defined by the law of nations," &c. "every such offender or offenders shall, upon conviction thereof," &c. "be punished with death," is a constitutional definition of the crime of piracy; that crime being defined by the writers on the law of nations with reasonable certainty. *The United States v. Smith*, 5 Wheat. 153. 160.

101. Robbery, or forcible depredation upon the sea, *animo furandi*, is piracy, by the law of nations, and by the act of Congress. *Ib.* *The United States v. Furlong et al.* 5 Wheat. 164. 184.

102. The 8th section of the act of 1790, c. 36. is not repealed by the act of the 3d of March, 1819, c. 76. to protect

the commerce of the United States, and punish the crime of piracy. *The United States v. Furlong et al.* 5 Wheat. 184. 192.

103. In an indictment for a piratical murder, (under the act of 1790, c. 36.) it is not necessary that it should allege the prisoner to be a citizen of the United States, nor that the crime was committed on board a vessel belonging to citizens of the United States; but it is sufficient to charge it as committed from on board such a vessel by a mariner sailing on board such a vessel. *Ib.* 194.

104. The words, "out of the jurisdiction of any particular State," in the act of 1790, c. 36. s. 8. are construed to mean out of the jurisdiction of any particular State of the Union. *Ib.* 200.

105. A commission issued by a person claiming to be the officer of a republic whose existence, *de facto* or *de jure*, is unacknowledged by the United States, will not authorize captures at sea. *The United States v. Klintock,* 5 Wheat. 144. 149.

106. *Quare*, Whether a person, acting with good faith under such a commission, is guilty of piracy? *Ib.*

107. However this may be, in general, under the peculiar circumstances of a case, showing that the seizure was made, not *jure belli*, but *animo furandi*, the commission will not exempt the offender from the charge of piracy. *Ib.*

108. A citizen of the United States fitting out a vessel in a port of the United States, to cruise against a power in amity with the United States, is not protected by a foreign commission from punishment for any offence committed against the property of citizens of the United States. *The United States v. Furlong,* 5 Wheat. 201.

109. On an indictment for piracy, the jury may find the national character of a vessel upon such evidence as will satisfy their minds, without the certificate of registry, or other documentary evidence, being produced, and without proof of their having been on board. *Ib.*

110. Each count in an indictment is a distinct substantive charge; and if the verdict conform to any one of the counts, which in itself will support the verdict, it is sufficient. Thus

**AGREEMENT.**

where, in an indictment for piracy, there were two counts, the one charging the offence as committed on the high seas, the other in a haven, basin, or bay, a general verdict of guilty may be sustained. *The United States v. Furlong et al.*, 5 Wheat. 184. 201.

*Et vide CONSTITUTIONAL LAW V.*

**COURTS OF THE UNITED STATES.**

**PRIZE.**

**SALVAGE.**

**SHIPPING.**

**STATUTES OF THE UNITED STATES.**

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**AGREEMENT.**

I. (A) *Different species of contracts.* (B) *What constitutes an agreement.* (C) *Construction of particular agreements.*

II. (A) *Agreements by public agents.* (B) *Agreements by private agents.*

III. *Consideration.* (A) *What is a sufficient consideration.* (B) *Illegal consideration.*

IV. *What renders an agreement void.*

V. *Extinguishment of a contract.*

**AGREEMENT I.**

(A) *Different species of contracts.*

1. A contract is a compact between two or more individuals, and is either executory or executed. *Fletcher v. Peck*, 6 Cranch, §7. 136.

2. An executory contract is one in which a party binds him-

self to do, or not to do, a particular thing. *Fletcher v. Peck*, 6 Cranch, 87. 136. *Sturges v. Crowninshield*, 4 Wheat. 122. 197.

3. A contract executed is one in which the object of the contract is performed; and this differs in nothing from a grant. *Fletcher v. Peck*, 6 Cranch, 87. 136.

(B) *What constitutes an agreement.*

4. An offer of a bargain, by one person to another, imposes no obligation upon the former, unless it is accepted by the latter according to the terms on which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the party who made it. *Eliason v. Henshaw*, 4 Wheat. 225.

5. Where A. offered to purchase of B. two or three hundred barrels of flour, to be delivered at Georgetown, (District of Columbia,) by the first water, and to pay for the same nine dollars fifty cents per barrel: and to the letter, containing this offer, required an answer *by the return of the wagon by which the letter was sent*. This wagon was at that time in the service of B., and employed by him in conveying flour from his mill to *Harper's Ferry*, near to which place A. then was. His offer was accepted by B., in a letter sent by the first regular mail to *Georgetown*, and received by A. at that place; but no answer was ever sent to *Harper's Ferry*. Held, that this acceptance, communicated at a place different from that indicated by A., imposed no obligation binding upon him. *Ib.*

(C) *Construction of particular agreements.*

6. B., in Philadelphia, agreed to pay to A.'s agent 170,000 guilders, in Amsterdam, on the 1st of March; and if he should fail so to do, then to repay to A. the value of the said guilders, at the rate of exchange current in Philadelphia, at the time demand of payment should be made, together with damages at the rate of 20 per cent., in the same manner as if bills of exchange had been drawn for said sum, and they had been returned protested for nonpayment, and lawful interest for any delay of pay-

ment which might take place after the demand. B. paid the 170,000 guilders in Amsterdam to the agent of A., on the 13th of May, instead of the 1st of March. *Held*, that A. was not entitled to the 20 per cent. damages, but might, in a suit upon the bond given to perform the contract, recover interest on the 170,000 guilders from the 1st of March to the 13th of May. *United States v. Gurney*, 4 *Cranch*, 333. 341.

7. The acceptance, in the above case, of any part of the sum due in Amsterdam, on a day subsequent to that stipulated in the contract, was a waiver of the claim to 20 per cent. damages in Philadelphia on the sum so accepted, for that sum could not be demanded in Philadelphia. But in waiving those damages, the obligee did not relinquish that right to interest which is attached to all contracts for the payment of money, which was only displaced by the agreement to receive a larger sum in damages, and which a mere tacit implied waiver of those damages might reinstate. *Ib.*

## AGREEMENT II.

(A) *Agreements by public agents.* (B) *Agreements by private agents.*

(A) *Agreements by public agents.*

8. A foreign consul is not responsible in an action on a contract made by him on account of his government. *Jones v. Le Tombe*, 3 *Dall.* 384.

9. A public agent of the United States' government, contracting for the use of the government, is not personally liable, even though the contract be under his private seal. *Hodgson v. Dexter*, 1 *Cranch*, 345.

10. An action on the case, brought by the United States, will lie against an individual, to recover the amount of a certificate of public debt, fraudulently obtained by the defendant from a public officer authorized to issue such certificates. *Fenemore v. The United States*, 3 *Dall.* 357.

11. But by such a mode of proceeding, the United States affirm the transaction, and forever preclude themselves from afterwards disputing the validity of the certificate. *Ib.*

12. It seems, that in such a case, the United States have a right to disaffirm the transaction, if the certificate remained in the hands of the party by whom it was fraudulently obtained, but not if it had passed into the hands of a *bona fide* purchaser.

S. C. 3 Dall. 364. Per ELLSWORTH, C. J.

13. The United States are not bound by the promise or representation of their agent, founded on a mistake of fact, unless it manifestly appears that the agent was acting within the scope of his authority, and was empowered, as agent, to make the promise or representation.

Thus, where the defendants were the commissioners employed and authorized by the government to sell and make contracts for the sale of lots in the city of Washington; and in pursuance of these powers, had made contracts with M. and N. who having advanced a considerable sum of money, were in the habit of directing the defendants to convey certain of the lots, which they had contracted for, to the vendees. The commissioners, supposing that M. and N. had not yet received titles to land equal in value to the sum which they had advanced, told the plaintiff that if he would obtain an order from M. and N. for certain lots, they should be conveyed to him, and entered this promise in their journal. But the commissioners soon after discovering that M. and N. had already received deeds for lots to the whole amount of the money they had advanced, gave notice to the plaintiff of this fact, offering, however, to convey to him the lots in question on his paying the price expressed in their contract with M. and N. Held, that the communication made by the commissioners to the plaintiff was altogether gratuitous, and that the United States could not, by a declaration of the commissioners proceeding from a mistake, lose the lien which was secured to them by the contract with M. and N. for the stipulated price of the property. If the commissioners had acted fraudulently, they might be personally liable in damages to the plaintiff; but having acted under

a mistake, neither they, nor the United States, were responsible. *Lee v. Monroe et al.* 7 Cranch, 366. 368.

14. In all cases of contract with the United States, through their agents, the United States have a right to enforce the performance of such contracts, or to recover damages for their violation, by actions in their own name, unless a different mode of suit be prescribed by law. *Dugan v. United States*, 3 Wheat. 172. 181.

(B) *Agreements by private agents.*

15. All contracts made by the authorized agents of a corporation, within the legitimate scope of its institution, are binding upon the corporation. *Bank of Columbia v. Patterson's Administrator*, 7 Cranch, 299. 305.

16. The acts of agents do not derive their validity from professing on the face, of them to have been performed in the exercise of their agency. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326. 337.

17. But the liability of the principal in such cases depends upon the facts, 1st. That the act was done in the exercise ; and, 2dly. Within the limits of the power delegated. *Ib.*

18. In ascertaining these facts, as connected with the execution of any written instrument, parol evidence is admissible. *Ib.*

19. An agent who covenants in his own name, although he describes himself as executor, is personally liable. *Duvall v. Craig*, 2 Wheat. 45. 56.

AGREEMENT III.

Consideration. (A) *What is a sufficient consideration.* (B) *Illegal consideration.*

(A) *What is a sufficient consideration.*

20. To constitute a consideration for an agreement, it is not absolutely necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable

flows from the person to whom it is made; and that the promise is the inducement to the transaction. *Violett v. Patton*, 5 Cranch, 142. 150.

21. In the common case of a letter of credit given by A. to B., the person who, on the faith of that letter, trusts B., has a remedy against A., although no benefit accrued to A. as the consideration of his promise. *Ib.*

22. A blank endorsement upon a blank piece of paper, with intent to give a person a credit, is in effect a letter of credit. *Ib.*

(B) *Illegal consideration.*

23. The Courts of this country will not enforce an agreement entered into in fraud of a law of the United States; although that agreement was made between persons who were then enemies of the United States, and the object of the agreement was a mere stratagem of war, and the law itself was only a temporary and war regulation which had ceased to exist. *Hannay v. Eve*, 3 Cranch, 242. 247.

24. One citizen of the United States has no right to purchase of, or sell to, another citizen, a license or pass from the public enemy, to be used on board an American vessel. *Patton v. Nicholson*, 3 Wheat. 204. 207.

AGREEMENT IV.

*What renders an agreement void.*

25. An agreement in a Court of Common Law, Chancery, or Prize, made under a clear mistake, will be set aside. *The Hiram*, 1 Wheat. 440. 444.

AGREEMENT V.

*Extinguishment of a contract.*

26. An action cannot be maintained on an original contract for goods sold and delivered, by a person who has received a

note as conditional payment, and has passed away that note.  
*Harris v. Johnston, 3 Cranch, 311.*

27. A security under seal extinguishes a simple contract debt, because it is of a higher nature. *Bank of Columbia v. Patterson's Administrator, 7 Cranch, 299. 303.*

28. But this effect has never been attributed to a sealed instrument, which merely recognises an existing debt, and provides a mode to ascertain its amount and liquidation. *Ib.*

29. The mere recital of a prior, in a later agreement, after it has been executed, does not extinguish the former. *Ib.*

30. The obligation of a contract is not fulfilled by a *cessio bonorum*. The parties have not merely in view the property in possession when the contract is formed, but its obligation extends to future acquisitions. *Sturges v. Crowninshield, 4 Wheat. 122. 198.*

***Et vide Assumpsit.***

**BAILMENT.**

**BILLS OF EXCHANGE AND PROMISSORY NOTES.**

**CHANCERY.**

**CONSTITUTIONAL LAW III.**

**CORPORATION II.**

**FRAUDS.**

**GUARANTY.**

**INFANCY.**

**INSURANCE.**

**LEX LOCI I.**

**LIMITATION OF ACTIONS I.**

**LOCAL LAW.**

**PARTNERSHIP.**

**SALE.**

**SHIPPING.**

**USURY.**

## ALIEN.

I. *Effects of alienage.* (A) *Disability of an alien; when he may take lands, and when and how his title will be devested.* (B) *Effects of the American revolution, and of the British treaties of 1783 and 1794, on the estates and titles of British subjects.* (C) *Effects of the French treaties of 1778 and 1800, on the estates and titles of French subjects.*

II. *Naturalization.*

## ALIEN I.

*Effects of alienage.* (A) *Disability of an alien; when he may take lands, and when and how his title will be devested.* (B) *Effects of the American revolution, and of the British treaties of 1783 and 1794, on the estates and titles of British subjects.*

1. By the common law, an alien may take by purchase, though not by descent; or, in other words, he cannot take by the act of law, but he may take by the act of the party. *Fairfax's devisee v. Hunter's lessee*, 7 Cranch, 603. 619. *Craig v. Leslie*, 3 Wheat. 563. 589. *Craig v. Radford*, Ib. 594. 597. *Orr v. Hodgson*, 4 Wheat. 453. 460.

2. Nor is there any distinction whether the purchase be by grant, or by devise. In either case, the estate rests in the alien: not, however, for his own benefit, but for the benefit of the State; or in the language of the ancient law, the alien has the capacity to take, but not to hold lands, and they may be seized into the hands of the sovereign. *Fairfax's devisee v. Hunter's lessee*, 7 Cranch, 603. 619.

3. But until the lands are so seized, the alien has complete dominion over the same. *Ib.*

4. An alien is a good tenant of the freehold in a *præcipe* on a common recovery: And he may convey the lands to a purcha-

ser. Though *Co. Litt.* seems to the contrary, yet it must probably mean that he can convey a defeasible estate only, which an office found will devest. *Fairfax's devisee v. Hunter's lessee*, 7 *Cranck*, 603. 619.

5. It seems, indeed, to have been held, that an alien cannot maintain a real action for the recovery of lands. (*Co. Litt.* 129. b. *Thel. Dig.* c. 6. *Dyer*, 2. b.) but it does not then follow that he may not defend, in a real action, his title to the lands against all persons but the sovereign. *Ib.*

6. In respect to these general rights and disabilities as to real property, there is no admitted difference between alien friends and alien enemies. *Ib.*

7. During war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended. *Ib.*

8. But as to capacity to purchase, it was adjudged in *Parker's Rep.* 267. that a bequest to an alien enemy was good, and after a peace might be enforced. *Ib.*

9. The common law, in these particulars, coincides with the law of nations. *Ib.*

10. The title acquired by an alien (friend or enemy) by purchase, is not devested until office found. *Fairfax's devisee v. Hunter's lessee*, 7 *Cranck*, 603. 621. *Craig v. Radford*, 3 *Wheat.* 594. 599.

11. This principle is founded upon the ground, that as the freehold is in the alien, and he is tenant to the lord of whom the lands are holden, it cannot be devested out of him but by some notorious act, by which it may appear that the freehold is in another. *Fairfax's devisee v. Hunter's lessee*, 7 *Cranck*, 603. 621.

12. The reason of the difference, why, when an alien dies, the sovereign is seized without office found, is because otherwise the freehold would be in abeyance, as an alien cannot have any inheritable blood. *Ib.*

13. Even after office found, the sovereign is not adjudged in possession, unless the possession were then vacant; for if the possession were then in another, the sovereign must enter or seize by,

his officer, before the possession in deed shall be adjudged in him. *Fairfax's devisee v. Hunter's lessee*, 7 Cranch, 603. 621.

14. And if we were to yield to the authority of *Staunford*, (*Prerog. Reg. c. 18. p. 56.*) that in the case of alien enemy, the king, "ratione guerrae," might seize without office found, yet the same authority assures us, "that the king must seize in those cases, ere he can have an interest in the lands, because they be penal towards the party." *Ib.*

15. Until the king be in possession by office found, he cannot grant lands which are forfeited by alienage. *Ib.*

16. An alien may *take*, by purchase, a freehold, or other interest in land, and may *hold* it against all the world except the king; and even against him until office found; and is not accountable for the rents and profits previously received. *Craig v. Leslie*, 3 Wheat. 563. 589.

17. R. C., a citizen of Virginia, being seized of real property in that State, made his will: "In the first place I give, devise, and bequeath unto J. L." and four others, "all my estate, real and personal, of which I may die seized and possessed, in any part of America, in special trust, that the afore-mentioned persons, or such of them as may be living at my death, will sell my personal estate to the highest bidder, on two years' credit, and my real estate on one, two, and three years' credit, provided satisfactory security be given, by bond and deed of trust. In the second place, I give and bequeath to my brother, T. C." an alien, "all the proceeds of my estate, real and personal, which I have herein directed to be sold, to be remitted to him accordingly as the payments are made, and I hereby declare the aforesaid J. L." and the four other persons, "to be my trustees and executors for the purposes afore-mentioned." Held, that the legacy given to T. C., in the will of R. C., was to be considered as a bequest of personal estate, which he was capable of taking for his own benefit, though an alien. *Ib.*

(B) *Effects of the American revolution, and of the British treaties of 1783 and 1794, on the estates and titles of British subjects.*

18. Debts due in the United States to British subjects before the war of the revolution, though sequestrated or paid into the State treasuries, revived by the treaty of peace of 1783, and the creditors are entitled to recover them from the original debtors. *The State of Georgia v. Brailsford*, 3 Dall. 1. 4, 5. *Ware v. Hylton*, *Id.* 199. 220.

19. The statute of limitations is suspended during war, as to alien enemies. *Ogden v. Blackledge*, 2 Cranch, 272.

20. The several States which compose this Union, so far at least as regarded their municipal regulations, became entitled from the time when they declared themselves independent, to all the rights and powers of sovereign States, and did not derive them from concessions of the British king. *M Ilvaine v. Coxe's lessee*, 4 Cranch, 209. 212.

21. The treaty of peace contains a recognition of the independence of these States, not a grant of it. *Ib.*

22. The laws of the several State governments, passed after the declaration of independence, were the laws of sovereign States, and as such were obligatory upon the people of each State. *Ib.*

23. *It seems*, that even the law of a State, whose form of government had been organized prior to the 4th of July, 1776, and which law passed prior to that period, would have been obligatory. *Ib.*

24. On the 4th of October, 1776, the State of New-Jersey was completely a sovereign and independent State, and had a right to compel the inhabitants of the State to become citizens thereof. *Ib.*

25. The legislature of the State of New-Jersey having, by its act of the 5th of June, 1777, asserted its right to the allegiance of such of its citizens as had left the State, and had at-

tempted to return to their former allegiance, a person born in the colony of New-Jersey before the year 1775, and residing there until the year 1777, but who then joined the British army, and ever since adhered to the British, claiming to be a British subject, and demanding and receiving compensation from the British government as a loyalist and refugee, has a right to take lands by descent in New-Jersey. *M'Ilvaine v. Coxe's lessee, 4 Cranch, 209. 212.*

26. The treaty of peace of 1783, between the United States and Great Britain, did not so operate upon the condition of a person in the above predicament, as to make him become an alien to the State of New-Jersey, in consequence of his election then made to become a subject of the king, and his subsequent conduct confirming that election; the laws of the State which had made him a citizen being still in full force, and not repealed, or in any manner affected by the treaty. *Ib.*

27. The concessions in the treaty of peace of 1783, on the part of his Britannic majesty, amounted to a formal renunciation of all claim to the allegiance of the citizens of the United States; but the question, who were at that period citizens, was necessarily left to depend upon the laws of the respective States, who, in their sovereign capacities, had acted authoritatively upon the subject. It left all such persons in the situation it found them, neither making those citizens who had by the laws of any State been declared aliens, nor releasing from their allegiance any who had become and were claimed as citizens. *Ib.*

28. A subject of Great Britain, born before the declaration of independence, who was never in the United States, cannot take lands in this country, by descent from a citizen. *Dawson's lessee v. Godfrey, 4 Cranch, 321.*

29. The act of Georgia of May, 1782, confiscated generally the estates of British subjects, with the exception of debts due to merchants residing in Great Britain, which were sequestered only. Under that act, a lien given by a person who adhered to the British, to a British creditor, by mortgage, was not confiscated. The estate of the mortgagor only was confiscated, not

that of the mortgagee. *Higginson v. Mein*, 4 Cranch, 415. 418.

30. The 5th article of the treaty of peace, of 1783, between the United States and Great Britain, concluding with this clause : " And it is agreed, that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights ;" applies to those cases where an actual confiscation has taken place ; and stipulates, that in such cases the interest of all persons having a lien upon such lands shall be preserved. *Ib.*

31. That clause of the treaty preserved the lien of a mortgagee of confiscated lands, which at the time of the treaty remained unsold. *Ib.*

32. Under the acts of Maryland of 1780, c. 45. and c. 49. the first of which declares, that " all property within this State, belonging to British subjects, debts only excepted, shall be seized, and is hereby confiscated to the use of this State"—and the second appoints certain commissioners, by name, to preserve all British property seized and confiscated by the former law, and declares the said commissioners to be in the full and actual seisin and possession of all British property seized and confiscated by the said act, without any office found, entry, or other act to be done, with power to the commissioners to appoint fit persons to enter and take possession of said property, for the purpose of its preservation ; held, that the equitable interests of British subjects were confiscated, without office found, or entry, or other act done, and although such equitable interests were not discovered until long after the peace of 1783. *Smith v. Maryland*, 6 Cranch, 286. 304.

33. A British subject, born in Great Britain before, cannot, since the revolution, take lands by descent in the United States, upon the ground of his being an *antenuus* born under a common allegiance before the separation of the two countries. *Dawson's lessee v. Godfrey*, 4 Cranch, 321. *Fairfax's devisees v. Hunter's lessee*, 7 Cranch, 693. 622.

34. Where the late Lord Fairfax died in 1781, having at that time the absolute property, seisin, and possession, of the waste and unappropriated lands in the Northern Neck of Virginia, and having previously devised the same to D. Fairfax, then an alien enemy, and a British subject, born, and who had always resided in Great Britain; and no entry or seizure having been made by the Commonwealth of Virginia, "ratione guerrae," during the war of the revolution, and no inquest of office having ever been found pursuant to the laws of Virginia; a grant was issued to one Hunter by public patent from the State of Virginia, in 1789, for a tract or parcel of the said lands: *Held*, that nothing passed by the grant to Hunter, and that the title of D. Fairfax was completely protected and confirmed by the 9th article of the British treaty of 1794. *Fairfax's devisee v. Hunter's lessee*, 7 Cranch, 603. 620. S. C. 1 Wheat. 304.

35. In the above case, it was once in the power of the Commonwealth of Virginia, by an inquest of office, or some equivalent act, to have vested the estate completely in itself or its grantee. But not having done so, its own inchoate title (and of course the derivative title of its grantee) became, by the operation of the treaty, ineffectual and void. *Ib.*

36. The common law as to inquests of office and seizure, so far as respects the lands in controversy in the above case, was not dispensed with by the statutes of Virginia, so as to make the grant to Hunter, in 1789, complete and perfect. *Ib.*

37. It was, perhaps, competent for the legislature, (supposing no treaty in the way,) by a special act, to have vested the land in the Commonwealth, for the cause of alienage, without an inquest of office. But such an effect ought not, upon principles of public policy, to be presumed upon light grounds. *Ib.*

38. And, at all events, the title of Hunter under the grant of 1789, could not be considered as more extensive than the title of the Commonwealth, viz. a title inchoate and imperfect; to be consummated by an actual entry under an inquest of office, or its equivalent, a suit and judgment at law by the grantee. *Ib.*

39. In the above case, D. Fairfax, the alien devisee, died

pending the suit; and it was contended that the freehold was thereupon cast upon the Commonwealth without an inquest, and thus arose a retroactive confirmation of the title of its grantee, Hunter: but it was held to be unnecessary to consider that argument, because admitting it to be applicable in general, the treaty of 1794 completely avoids it; and the heirs of D. Fairfax were, by that treaty, made capable in law of taking from him by descent, and the freehold was not, therefore, on his death, cast upon the Commonwealth. *Fairfax's devisee v. Hunter's lessee*, 7 Cranch, 603. 620. S. C. 1 Wheat. 304.

40. JOHNSON, J. dissented from the opinion of the Court in the above case, (so far as it pronounced the grant of the State invalid, because it was not preceded by an inquest of office,) upon the ground that there was nothing mystical, or of indispensable obligation, in that proceeding, and that it was competent for the State to dispense with it, and assert its rights over the alien's property by other means. *Ib.*

41 Under the 9th article of the treaty between the United States and Great Britain of 1794, by which it is stipulated, that British subjects, holding lands in the United States, and their heirs, so far as respects those lands, and the remedies incident thereto, should not be considered as aliens; the parties must show that the title to the land, for which the suit was commenced, was in them, or their ancestors, at the time the treaty was made: But it is not necessary that they should have an actual possession or seizin. *Harden v. Fisher*, 1 Wheat. 300. *Orr v. Hodgson*, 4 Wheat. 453. 463.

42. G. C., born in the colony of New-York, went to England in 1738, where he resided until his decease; and being seized of lands in New York, he, on the 30th of November, 1776, in England, devised the same to the defendant and E. C., as tenants in common, and died so seized on the 10th of December, 1776. The defendant and E. C. having entered, and becoming possessed, E. C. on the 3d of December, 1791, bargained and sold to the defendant all his interest. The defendant and E. C. were both born in England long before the revolution. On the 22d of

March, 1791, the legislature of New-York passed an act to enable the defendant to purchase lands, and to hold all other lands which he might then be entitled to within the state, by purchase or descent, in fee simple, and to sell and dispose of the same in the same manner as any natural born citizen might do. By the treaty between the United States and Great Britain of 1794, (art. 9.) it is agreed, that British subjects who then held lands in the territories of the United States, and American citizens who then held lands in the dominions of his majesty, should continue to hold them according to the nature and tenure of their respective estates and titles therein ; and might grant, sell, or devise the same to whom they pleased, in like manner as if they were natives, and that neither they nor their heirs or assigns should, so far as respects the said lands and the legal remedies incident thereto, be considered as aliens." The defendant, at the time of the action brought, still continued to be a British subject. *Held*, that he was entitled to hold the lands so devised to him by G. C., and transferred to him by E. C. *Jackson v. Clarke*, 3 Wheat. 1.

43. The 6th art. of the treaty of peace between the United States and Great Britain, of 1783, completely protected the title of British subjects to lands in the United States, which would have been liable to forfeiture, by escheat, for the defect of alienage. That article was not meant to be confined to confiscations *jure belli*. *Orr v. Hodgson*, 4 Wheat. 453. 462.

44. The 9th art. of the British treaty of 1794, did not mean to include any other persons than British subjects, or citizens of the United States. *Ib.*

(C) *Effects of the French treaties of 1778 and 1800, on the estates and titles of French subjects.*

45. The treaty of amity and commerce of 1778, between the United States and France, stipulates, (art. 11.) that "The subjects and inhabitants of the said United States, or any one of them, shall not be reputed *aubains* in France ; and, consequently, shall be exempt from the *droit d'aubaine*, or other similar

duty, under what name soever. They may, by testament, denation, or otherwise, dispose of their goods, moveable and immoveable, (*biens meubles et immeubles,*) in favour of such persons as to them shall seem good, and their heirs, subjects of the said United States, residing whether in France or elsewhere, may succeed them, *ab intestat*, without being obliged to obtain letters of naturalization, and without having the effect of this concession contested or impeded under pretext of any rights or prerogatives of provinces, cities, or private persons; and the said heirs, whether such by particular title, or *ab intestat*, shall be exempt from all duty called *droit de detraction*, or other duty of the same kind, saving, nevertheless, the local rights or duties, as much, and as long as similar ones are not established by the United States, or any of them. The subjects of the most christian king shall enjoy, on their part, in all the dominions of the said States, an entire and perfect reciprocity relative to the stipulations contained in the present article," &c. This article gave to the subjects of France a right to purchase and hold lands in the United States. *Chirac v. Chirac*, 2 Wheat. 259. 269.

46. Quære, What was the effect of this treaty under the confederation? *Ib.*

47. Whatever might have been its effect under the confederation, the treaty became the supreme law of the land, on the establishment of the present constitution. *Ib.*

48. The power of naturalization is exclusively in Congress. *Ib.*

49. J. B. C., a native of France, migrated into the United States in 1793, and became domiciled in Maryland. On the 22d of September, 1795, he took the oaths of citizenship, according to an act of Assembly of Maryland, passed in 1779, and the next day received a conveyance in fee of lands in that State. In 1798, he was naturalized under the laws of the United States; and in 1799, died intestate, leaving no legitimate heirs, other than natives and residents of France. Upon the supposition that the lands were escheatable, the State of Maryland conveyed them to his natural son, with a saving of the rights of all

persons claiming by devise or descent from J. B. C.; under which grant the natural son took possession of the lands. In 1809, the heirs at law of J. B. C., French subjects, brought an action of ejectment for the lands in the Circuit Court, and in 1815, obtained a judgment in their favour. Judgment affirmed by this Court. *Chirac v. Chirac*, 2 Wheat. 259. 269.

50. J. B. C. having died seized in fee of the lands in question, his heirs being French subjects; the treaty of 1778 having been abrogated by act of Congress in 1799; and the act of Maryland, of 1789, permitting the lands of a French subject, who had become a citizen of Maryland, dying intestate, to descend on the next of kin, being non-naturalized Frenchmen, with a proviso vesting the land in the State, if the French heirs should not, within ten years, become resident citizens of the State, or convey the lands to a citizen: *held*, that the time for the performance of this condition having expired before the action was brought, the estate was terminated, unless supported by the convention of 1800 between the United States and France. *Ib.*

51. But the convention of 1800, (art. 7.) enabling citizens of the one country, holding lands in the other, to dispose of the same by testament, or otherwise, and to inherit lands in the respective countries without being naturalized; *held*, that it rendered the performance of this condition a useless formality, and that the conventional rule applied equally to the case of those who took by descent under the act, as to those who acquired by purchase without its aid. *Ib.*

52. The farther stipulation in the convention of 1800, (art. 7.) "that in case the laws of either of the two States should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be," gave to a French subject, who had acquired lands by descent, or devise, (and, perhaps, in another mode of purchase,) the right, during life, to sell, or otherwise dispose thereof, though lying in a State where lands purchased by an alien, generally, would be immediately escheatable. *Ib.*

53. Although the convention of 1800 has expired by its own limitation of eight years, yet the instant the descent was cast on a French subject, during its continuance, his rights became complete under it, and could not be affected by its subsequent expiration. *Chirac v. Chirac*, 2 Wheat. 259. 269.

## ALIEN II.

## Naturalization.

54. Under the naturalization act of January 29th, 1795, c. 261. a certificate by a competent Court, that the alien had taken the oath required by the act, s. 1. confers upon him the rights of a citizen, although it does not appear, by the certificate, that he was by the judgment of the Court *admitted a citizen*, or that the Court was satisfied that during the term of two years, mentioned in the same section, he had behaved as a man of good moral character, attached to the constitution of the United States, and well disposed to the good order and happiness of the same. *Campbell v. Gordon*, 6 Cranch, 176. 182. *Stark v. Chesapeake Ins. Co.* 7 Cranch, 420.

55. *Quære*, Whether, in the order of time, this satisfaction, that the alien has behaved as a man of good moral character, &c. must be first given, or whether it may not be required after the oath is administered, and, if not then given, whether a certificate of naturalization may not be withheld? *Campbell v. Gordon*, 6 Cranch, 176. 182.

56. However this may be, if the oath is administered, and nothing appear to the contrary, it must be presumed that the Court before whom the oath was taken, was satisfied as to the character of the applicant. *Ib.*

57. *Quære*, Whether under the 3d sec. of the naturalization act of 1795, c. 261. the naturalization of an alien confers upon his children the rights of citizens, after their coming to, and residing within the United States, they having been resident in a foreign country at the time when their father was naturalized? *Ib.*

58. However this may be under the act of 1795, it is clear that under the act of the 14th of April, 1802, c. 288. s. 4. the children of persons duly naturalized under any of the laws of the United States, being under the age of 21 years at the time of the naturalization of their parents, are, if dwelling within the United States, to be considered as citizens. *Campbell v. Gordon*, 8 Cranch, 176. 182.

*Et vide CONSTITUTIONAL LAW II. (C) (E) V. (C)  
PRIZE II. IV.*

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## ASSIGNMENT.

1. Where a chose in action is assigned by the owner, he cannot interfere to defeat the rights of the assignee in the prosecution of a suit brought to enforce those rights. *Welch v. Mandeville*, 1 Wheat. 235. *Mandeville v. Welch*, 5 Wheat. 277. 283.
2. It makes no difference, in this respect, whether the assignment be good, at law, or in equity. *Mandeville v. Welch*, 5 Wheat. 277. 283.
3. But this doctrine only applies to cases where the entire chose in action is assigned, and not to a partial assignment. *Ib.*

*Et vide BILLS OF EXCHANGE AND PROMISSORY NOTES I.  
CHANCERY III. (A)*

**AWARD.****ASSUMPSIT.**

1. The defendants having ordered the plaintiff to purchase salt for them, and to draw on them for the amount, and he having so purchased and drawn, they are bound to accept and pay his bills; and if they do not, he may recover from them the amount of the bills and damages, and costs of protest, (if he has paid the same,) upon a count for money paid, laid out and expended, and the bills of exchange may be given in evidence on that count. *Riggs v. Lindsay*, 7 *Cranch*, 500.

2. If, after the protest of the bills, the plaintiff sell the salt without orders, it shall not prejudice his right of action, although he render no account of sales to the defendants; but if he has acted irregularly in thus selling, he will be liable in a proper action for the damages which the defendants have sustained by such conduct. *Ib.*

3. A promise by a merchant's agent, that he would write to his principal to get insurance done, does not bind his principal to insure. *Randolph v. Ware*, 3 *Cranch*, 503.

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**AWARD.**

1. The award of arbitrators appointed under a mutual mistake of both parties, in supposing themselves bound by law to submit the matter in dispute to arbitration, is not obligatory. *Pelisch v. Ware*, 4 *Cranch*, 347. 366.

2. When a controversy concerning the price of land, and not the question of title, is submitted to arbitrators, the submission and award need not be under seal. *Davy's executors v. Faw*, 7 *Cranch*, 171. 176.

3. An award is not void, because it is in the alternative, and contingent; nor because one of the alternatives requires the party to do an act in conjunction with others not parties to the award, and over whom he has no control; as to pay money, or to convey a good title to certain property, which title would not, in the opinion of the arbitrators, be good, unless other persons joined in the conveyance. *Thornton v. Carson*, 7 Cranch, 596.

4. Where claims against a party, both in his own right, and in a representative character, are submitted to the award of arbitrators, it is a valid objection to the award, that it does not precisely distinguish between moneys which are to be paid to him in his representative character, and those for which he is personally bound. *Lyle v. Rodgers*, 5 Wheat. 394. 406.

5. An award may be void in part, and good for the residue. But if the part which is void be so connected with the rest as to affect the justice of the case between the parties, the whole is void. *Ib.*

6. An attorney at law, as such, has authority to submit the cause to arbitration. *Holker v. Parker*, 7 Cranch, 436. 449.

7. But an attorney at law, merely as such, has no authority to make a compromise for his client, and a compromise thus made will be set aside by a Court of Equity, even if cloathed with the forms of an award, if the conduct of the injured party be blameless. *Ib.*

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## BAILMENT.

1. In an action brought against a post master for negligence in not safely transmitting a letter containing money, in the mail, and issue taken upon the neglect of the post master himself, it is not competent to give in evidence the neglect of his assistant. *Dunlop v. Munroe*, 7 Cranch, 242. 269.

2. The distinction between the relation of a post master to his sworn assistant acting under him, and between master and servant generally, has long been settled ; and though the latter relation might sanction the admission of such evidence, if it is intended to charge a post master for the negligence of his assistants, the pleadings must be made up according to the case ; and his liability then will only result from his own neglect in not properly superintending the discharge of their duties in his office. *Dunlop v. Munroe, 7 Cranch, 242. 269.*

3. In order to make a post master liable for negligence, it must appear that the loss or injury sustained by the plaintiff, was the consequence of the negligence. *Ib.*

4. An entry on the post bill is not conclusive evidence of the transmission of a letter, for it may still never have been put into the mail, or may have been stolen in its passage. *Ib.*

5. Where the owner of certain slaves, who was also part owner of a vessel, hired the slaves to the master of the vessel to proceed as mariners on board, on a voyage, at the usual wages, and without any special contract of hiring ; *held*, that the master having acted with good faith, was not responsible for the escape of the slaves in a foreign port, which was one of the contingent *termini* of the voyage, and, consequently, within the hazards to which the owner knew his property might be exposed ; although it was doubtful whether the master had strictly pursued his orders in going to such port. *Beverly v. Brooke, 2 Wheat. 100.*

BILLS OF EXCHANGE AND PROMISSORY  
NOTES.

- I. *Form, requisites, and effect of a bill or note.*
- II. *Transfer and endorsement.*
- III. *Consideration.*
- IV. *Acceptance of a bill.*
- V. *Notice of non-acceptance and non-payment.*
- VI. *Liability of the parties.*
- VII. *Action on a bill or note.*

BILLS OF EXCHANGE AND PROMISSORY  
NOTES I.

*Form, requisites, and effect of a bill or note.*

1. Where a bill of exchange is drawn by a public officer, in his official character, on his government, no action lies against him in his private capacity, if it be unpaid. *Jones v. Le Tombe, 3 Dall. 384.*

2. Where an endorsed note is received, not as an absolute, but as a conditional payment, from the endorser, it does not extinguish the original contract. But in case of such receipt as a conditional payment, if there be a want of due diligence to receive the money due thereon, the endorser is discharged. *Clark v. Young, 1 Cranch, 181.*

3. In such a case of conditional payment, it is not necessary to prove an offer to return and reassign the note before a suit may be commenced on the original consideration for which it was assigned. *Ib.*

4. An action cannot be maintained on an original contract for goods sold and delivered by a person who has received a note as conditional payment, and has passed away that note. *Harris v. Johnston, 3 Cranch, 311.*

## 40 BILLS OF EXCHANGE AND PROMISSORY NOTES.

5. A promissory note given and received in discharge of an open account, is a bar to an action on the open account, though the note be not paid. *Sheeley v. Mandeville*, 6 Cranch, 253.

6. By making a note negotiable on its face at a bank, the maker authorizes the bank to advance, on his credit, to the holder of the note, the sum expressed on the face of it; and it would be a fraud upon the bank to set up off-sets against this note in consequence of any transactions between the parties. *Mandeville v. Union Bank of Georgetown*, 9 Cranch, 1.

7. A bill of exchange is an assignment to the payee of a debt due to the drawer from the drawee, where the bill has been accepted, whether drawn on general or specific funds, and whether the original bill be negotiable or not. *Mandeville v. Welch*, 5 Wheat. 277.

8. But where an order is drawn, either on general or specific funds, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless the consent to the appropriation, by accepting the draft, or an obligation to that effect, may be implied from the custom of trade, or the dealings between the parties. *Ib.*

9. Where a check is drawn by a person who is cashier of a bank, and it appears doubtful upon the face of the check whether it is a private or an official check, parol evidence is admissible to show it to be an official check. *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 327.

## BILLS OF EXCHANGE AND PROMISSORY NOTES II.

### *Transfer and endorsement.*

10. If a person endorse a blank paper, with intent that a promissory note should be written on the other side, and that he should be endorser, it is good and binding upon him. *Violett v. Patton*, 5 Cranch, 142.

11. The mere possession of a note by the endorsee, who had

## BILLS OF EXCHANGE AND PROMISSORY NOTES. 41

endorsed it to another, is not sufficient evidence of his right of action against his endorser, without a reassignment or receipt from the last endorsee. *Welch v. Lindo*, 7 *Cranch*, 159. *Contra, Dugan v. United States*, 7 *Cranch*, 180.

12. An endorsement of a note without recourse to the endorser, is not evidence of money had and received by the endorser to the use of the endorsee. *Welch v. Lindo*, 7 *Cranch*, 159.

13. If a bill of exchange be endorsed to the Treasurer of the United States, *officially*, the United States may maintain a suit in their own name on the endorsement. *Dugan v. United States*, 3 *Wheat*. 172.

14. *Quære*, How this would be as to an endorsement to a *private agent*; whether the principal could maintain an action in his own name? At all events, on the endorsement to a *public agent*, the United States may. *Ib.*

15. If any person who endorses a bill of exchange for value, or for the purpose of collection, shall come to the possession of the bill again, he is to be regarded, unless the contrary appear, as the *bona fide holder* and proprietor, and entitled to recover upon it, notwithstanding there may be one or more endorsements upon it in full, subsequent to the one to himself, without producing any receipt or endorsement back from either of the subsequent endorsers, whose names he may strike out or not from the bill as he shall think proper. *Ib.*

## BILLS OF EXCHANGE AND PROMISSORY NOTES III.

### *Consideration.*

16. Bills of exchange and promissory notes are distinguishable from all other choses in action by being *prima facie* evidence of a valuable consideration between all parties to the same, and all other persons against whom they may be used as evidence. *Mandeville v. Welch*, 5 *Wheat*. 277.

17. The act of Virginia of 1748, respecting bills of exchange, does not extend to a bill, of which the consideration is not

## 42 BILLS OF EXCHANGE AND PROMISSORY NOTES.

money or a debt antecedently due. *Brown v. Barry*, 3 Dall. 365.

18. An endorsement is *prima facie* evidence of having been made for full value, and it is incumbent on the other party to show it to be otherwise. *Riddle v. Mandeville*, 5 Cranch, 322.

19. Although the consideration of a note fail, by reason of the failure of the payee to perform an agreement, yet if a new agreement be entered into between the parties, as a substitute for the old, this failure of the original consideration creates no equity in favour of the maker of the note against the endorsee, even in Virginia. *Young v. Grundy*, 7 Cranch, 548.

20. Where a promissory note was given for the purchase of real property, and the title to the real property fails, it is no good defence against the note, unless the failure be total. *Greenleaf v. Cook*, 2 Wheat. 13.

21. And where the note is given with a full knowledge of the extent of the incumbrance on the title, and the party consents to take the title, the defect is no bar to an action on the note. *Ib.*

## BILLS OF EXCHANGE AND PROMISSORY NOTES IV.

### *Acceptance of a bill.*

22. A letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, if shown to a person, who afterwards takes the bill on the credit of the letter, is a virtual acceptance, binding upon the promisor. *Coolidge v. Payson*, 2 Wheat. 66.

**BILLS OF EXCHANGE AND PROMISSORY  
NOTES V.**

*Notice of non-acceptance and non-payment.*

23. The custom of merchants in the United States, does not ordinarily require, to recover on a protest for non-payment of a bill, that a protest for non-acceptance should be produced, though the bills were not accepted. *Brown v. Barry*, 3 Dall. 365. *Clarke v. Russell*, 3 Dall. 415.

24. The endorser of a promissory note, for the accommodation of the maker, is entitled to strict notice of non-payment. *French's executrix v. Bank of Columbia*, 4 Cranch, 141.

25. If the drawer of a bill of exchange, at the time of drawing, has a right to draw, and to expect that his bill will be honoured, he is entitled to strict notice of its dishonour. *Ib.*

26. A demand of payment of a promissory note, should be made upon the last-day of grace, and notice of the default of the maker be put into the post-office, if he lives in another place, early enough to be sent by the mail of the succeeding day: *Lenox v. Roberts*, 2 Wheat. 373.

27. In debt, under the statute of Virginia, against the endorser of a foreign bill of exchange, the declaration should aver notice of the protest for non-payment. *Slocum v. Pomroy*, 6 Cranch, 221.

**PROMISSORY NOTES AND BILLS OF EX-  
CHANGE VI.**

*Liability of the parties.*

28. In an action by the endorsee against the endorser of a foreign bill of exchange, the defendant is liable for damages according to the law of the place where the bill was endorsed,

#### 44 · BILLS OF EXCHANGE AND PROMISSORY NOTES.

for the endorsement is a new substantive contract. *Slocum v. Pomroy*, 6 *Cranck*, 221.

29. The maker of a note, payable to order, is liable to refund the amount of the note, and costs of protest, to an endorser, who has been obliged to take up the note after protest. *Morgan v. Reintzel*, 7 *Cranck*, 273.

30. A promissory note, given by one member of a commercial company to another member, for the use of the company, will sustain an action at law by the promisee in his own name, notwithstanding both are partners in the company, and the money, when recovered, will belong to the company. *Van Ness v. Forrest*. 8 *Cranck*, 30.

31. The endorser of a note, charged by due notice upon default of the maker, may be proceeded against by the holder, and is not discharged by the holder's not issuing an execution, or countermanding it against the maker; nor is the endorser entitled to relief in such case by a Court of Equity, as a surety. *Lenox v. Prout*, 3 *Wheat*. 520.

32. In Virginia, an action of *indebitatus assumpsit* cannot be maintained by the assignee of a promissory note, against a remote assignor. *Mandeville v. Riddle*, 1 *Cranck*, 290.

33. The act of Virginia on this subject is silent in respect to the claim of an assignee against the assignor, in case of the insolvency of the debtor; but it has been held, that the law implies an *assumpsit* from the assignment, as between an assignor and his immediate assignee, but not a remote assignee. *Ib.*

34. It is not necessary, in all cases, in Virginia, to sue the maker of a promissory note, to entitle the holder to an action against the endorser; as, for instance, if the maker be insolvent, or the conduct of the endorser prevent the bringing of a suit. *Clark v. Young*, 1 *Cranck*, 181.

35. In Virginia, an action on an endorsed note can be maintained by the endorsee only against the maker, or against the immediate endorser to the endorsee. *Harris v. Johnston*, 3 *Cranck*, 311.

## BILLS OF EXCHANGE AND PROMISSORY NOTES. 45

36. In Virginia, the endorser of a promissory note is not liable to the holder by any express statute, but only under the implied contract created by the endorsement. That implied contract, by the general understanding of the country, is, that he would pay the debt, if by due diligence it could not be obtained from the maker. *Yeaton v. Bank of Alexandria*, 5 Cranch, 49.

37. By the law of Virginia, the maker of a note must be sued, if solvent, before resort can be had to the endorser; but his insolvency dispenses with the necessity of suing him. *Violetti v. Patton*, 5 Cranch, 142.

38. In Virginia, the endorser of a promissory note is not liable on nonpayment by the maker, unless the maker is shown to be insolvent, or a suit has been brought against him and proved fruitless; although such endorser has been counter-secured by the maker for such endorsement. *Dulany v. Hodgkin*, 5 Cranch, 333.

39. In Virginia, the endorsee of a note may recover the amount against a remote endorser in equity, though not at law. *Riddle v. Mandeville*, 5 Cranch, 322.

40. In such suit, the defendant has a right to insist that the other endorsers shall be made parties; and he has the same equity against the remote endorsee, as against his immediate endorsee. *Ib.*

## BILLS OF EXCHANGE AND PROMISSORY NOTES VII.

### Action on a bill or note.

41. A several judgment against one joint promisor of a note, is no bar to a joint action against both on the same note. *Sheehy v. Mandeville*, 6 Cranch, 253.

42. A joint note is not merged in a judgment against one of the promisors on his individual assumpsit; but the other may be charged in a subsequent joint action if he pleads severally. *Ib.*

43. A note, payable at sixty days, does not support a count

which does not state when the note is payable; and even upon executing a writ of inquiry, the variance would be fatal. *Sheehy v. Manderville*, 7 Cranch, 208.

44. In a suit against the maker of a note, by an endorser who has taken it up, the plaintiff must, at the trial, produce the note. *Morgan v. Reintzel*, 7 Cranch, 273.

45. An action of debt lies by the payee of a note against the maker, where the note is expressed to be for value received. *Rabourg v. Peyton*, 2 Wheat. 385.

46. So by an endorsee against the acceptor of a bill of exchange expressed to be for value received. *Ib.*

47. In Virginia, in an action by an endorsee of a promissory note against the maker, the latter may set off a negotiable note of the endorser, which he held at the time of receiving notice of the endorsement of his own note, although the note thus set off was not due at the time of the notice, but became due before the note on which the suit was brought. *Stewart v. Anderson*, 6 Cranch, 203.

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## BOND.

1. A bond cannot be delivered to one of the obligees as an escrow. *Moss v. Riddle*, 5 Cranch, 351. 357.

2. Where there are several obligees constituting a partnership, a delivery to one is a delivery to all. *Ib.*

3. Where a statute requires a bond to be taken in double the value of the thing concerning which it is executed, and the parties, voluntarily, and without fraud, assent to the insertion of a given sum as equal to double the value, they are estopped from denying that it is double the true value. *Speake v. United States*, 9 Cranch, 28. 36. MARSHALL, C. J., dissentiente.

4. Where a bond was given by the agent of an unincorporated joint stock company, to the directors for the time being, for the faithful performance of his duties, &c. and the directors were appointed annually, and changed before a breach of the condition of the bond, the agent and his sureties were held liable to an action brought by the obligees after they had ceased to be directors. *Anderson v. Longdon, 1 Wheat. 85. 91.*

5. If the condition of a bond be to pay 1700 dollars, or the duties which may be ascertained to be due upon certain goods imported, it is not in the option of the obligee to discharge the bond by payment of the 1700 dollars. *Arnold v. United States, 9 Cranch, 104.*

6. It seems, that an obligee may, at law, recover more than the penalty of the bond. *Ib.*

*Et vide DEED II.*

**EVIDENCE VIII.**

**STATUTES OF THE UNITED STATES IV. IX.**

## CHANCERY.

- I. *Accident and mistake.*
- II. *Prevention of fraud.*
- III. *Trusts.* (A) *Ordinary trusts.* (B) *Mortgages.* (C) *Money considered as land, and land as money.* (D) *Lien of vendor for unpaid purchase money.*
- IV. *Specific performance.*
- V. *Matters of account.*
- VI. *Jurisdiction of the court.*
- VII. *Chancery practice.*

## CHANCERY I.

*Accident and mistake.*

1. G. and B., partners in trade, were equally and jointly interested in the ship Northern Liberties, and her cargo; and G. wrote to Messrs E. S. & Co., of Boston, inquiring at what premium insurance could be there obtained upon the cargo, at and from Teneriffe to La Vera Cruz, and describing himself in the letter as *one of the parties interested* in the property to be insured. Upon receiving their answer, he again wrote, saying, "Your office asks too high a premium for the risk I was inquiring after; the vessel cannot be out of time, as she sailed from hence for Teneriffe in February, where we have not learned that she had arrived; less so that she had sailed; but as it is *my principle* to run no risks where *I* can help it, *I* have prevailed upon *my co-partner* to anticipate her arrival and sailing again to Vera Cruz. To give you a perfect idea of the nature of the risk to be insured, you will find a copy on the other side of the application to our offices, who took a good deal at seventeen and a half per cent.; we may be induced to give one or two per cent. more to complete the business, and wish you to say whether it could not

be effected with you at seventeen and a half per cent., or near that; and we have not insured elsewhere before a return of your answer, I may likely give you an order to effect twenty or twenty-five thousand dollars." The copy of the application annexed to the letter, stated, that "on the 20th of February last, the ship N. L. sailed from this for Teneriffe, commanded by F. K., a man of courage and good conduct; she mounted sixteen six pounders, and had a crew of thirty in number, &c. Upon this vessel's cargo we want insurance, at and from Teneriffe to La Vera Cruz. The ship and cargo really and truly belong to American citizens." Application for insurance having been made, upon this letter and representation, for G., by his agents, E. S. & Co., they received from the insurance company a policy in his name only, "as property may appear," without the clause stating the insurance to be for the benefit of all concerned. On a bill filed to correct the mistake, which was denied by the answer; held, that a Court of Equity could not relieve by conforming the policy to the intention of G., which was to insure for himself and partner, that intention not having been unequivocally and clearly communicated to the insurers. *Graves v. Boston Marine Ins. Co., 2 Cranch, 419. 442.*

2. A bond executed in pursuance of articles of agreement, may, in equity, be restrained by the articles, if the departure from them be clearly shown. *Finley v. Lynn, 6 Cranch, 238. 249.*

3. An award will not be set aside in equity, on account of an omission by the arbitrators to act upon part of the matters submitted, unless that omission shall have injured the complainant. *Davy's executors v. Faw, 7 Cranch, 171. 174.*

4. Any fact which clearly proves it to be against conscience to execute a judgment at law, and of which a party could not have availed himself in a Court of Law; or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a Court of Equity to interfere by injunction, restraining the adverse party from availing himself of the

judgment obtained at law. *Marine Ins. Co. v. Hodgson, 7 Cranch, 332. 336.*

5. But a defence cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of the Court of Equity that the defence ought to have been sustained at law. *Ib.*

6. A Court of Equity being capable of imposing its own terms on the party to whom it grants relief, there may be cases in which its aid ought to be extended to a party who might have defended himself at law, but has omitted to defend himself there. But such cases are rare: the equity of the complainant must be free from doubt; and the judgment must be one, of which it would be unconscientious for the party who has obtained it to avail himself. *Ib.*

7. Upon an insurance on a valued policy, if a misrepresentation of the age and tonnage of the vessel, whereby the underwriters were induced to agree to a high valuation, be a defence, it is at law, and not in equity; unless the complainants be prevented from using it at law by the act of the insured, or by any positive rule which disabled them from doing so. *Ib.*

8. An attorney at law, as such, having no authority to make a *compromise* for his client, a compromise thus made, though in the form of an award, or of a judgment at law, will be relieved against in equity, if the conduct of the injured party has been blameless. *Holker v. Parker, 7 Cranch, 436. 453.*

## CHANCERY II.

### *Prevention of fraud.*

9. Bill filed by the State of Georgia, against S. B., R. W. P., and J. H., merchants and copartners, and J. S., surviving partner of K. and S., setting forth, that on the 4th of May, 1782, the State of Georgia enacted a law entitled, "An act for inflicting penalties on, and confiscating the estates of, such persons as are therein declared guilty of treason, and for other purposes therein

mentioned." That by the operation of this act, all the debts, dues, and demands of the citizens of Georgia, to persons who had been subjected to the penalties of confiscation in other States, and of British merchants, and others residing in Great Britain, and of all other British subjects, were vested in the said State. That J. S., a citizen of Georgia, one of the defendants, and surviving copartner of K. & S., was indebted to the other defendants, S. B., R. W. P., and J. H., in the sum of 7,058*l.* 9*s.* 5*d.* upon a bond dated in 1774, which debt, by virtue of the above act, was transferred from the obligees, and vested in the State: S. B., being a native subject of Great Britain, constantly residing there from the year 1767, until after the passing of the act; R. W. P. coming within the description of persons, whose estates, real and personal, (debts excepted,) were confiscated by acts of the legislature of South Carolina, if, after refusing to take the oath of allegiance, they returned to that State; and J. H.'s estate, real and personal, (debts excepted,) having been expressly confiscated by an act of the legislature of South Carolina. That an action had been brought upon the bond by the obligees against J. S., as surviving partner of K. and S., in the Circuit Court for the District of Georgia, in the year 1791, in which judgment was rendered on demurrer for the plaintiffs. That the Attorney-General of the State of Georgia, applied to the Circuit Court to admit the State, as a party, to defend its claim in said suit, which application was rejected. The bill charged a confederacy between the parties to the suit in the Circuit Court to defraud the State; and that in pursuance thereof, the plaintiffs in that suit had issued execution against the defendant, and the defendant had confederated with them not to take out a writ of error; so that the defendant's property would be levied on, and disposed of, and the State defrauded of its just claim thereon. The bill concluded with praying, "that any levy under said execution, and any sales in pursuance of a levy, and moneys raised, or that might be raised, might be stayed in the hands of the marshal of the Circuit Court by an injunction from this Court. And that the

marshal be directed to pay the moneys so raised to the treasurer of the State of Georgia for her use, and that the said J. S. be decreed to pay said treasurer the balance due on the bond aforesaid for the use of the State. *Per Curiam*, an injunction granted, it being considered equitable to stay the money in the hands of the marshal, until the right to it was fairly decided at law. *The State of Georgia v. Brailsford et al.* 2 *Dall.* 402.

10. On a motion, at a subsequent term, to dissolve the injunction and dismiss the bill, the Court was of opinion, that if the State of Georgia had a right to the debt, it was a right to be pursued at common law; but that the ground of equity for granting an injunction continued the same—namely, that the money ought to be kept for the party to whom it belonged. The injunction was therefore continued until the next term, when an amicable action was entered and tried at the bar of this Court, and a verdict given for the defendants S. B. *et al.*, and the injunction was, of course, dissolved. *S. C.* 2 *Dall.* 419. *3 Dall.* 1.

11. In order to support a motion for an injunction, the bill should set forth a case of probable right, and a probable danger that the right would be defeated, without this special interposition of the Court. *Ib. Per Th. Johnson, J.* 2 *Dall.* 405.

12. The provision contained in the judiciary act of 1793, [xxii.] c. 167. s. 5. that no injunction shall "be granted in any case, without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same," extends to injunctions granted by the Supreme Court, or the Circuit Court, as well as to those that may be granted by a single judge. *New-York v. Connecticut*, 4 *Dall.* 1. 2.

13. The design and effect of injunctions must render a shorter notice *reasonable* notice, in the case of an application to a Court, than would be so construed in most cases of an application to a single judge: and, until a general rule shall be settled, the particular circumstances of each case must also be regarded. *Ib.*

14. Where a bill is filed to obtain a discovery of the defendant's title, and an injunction is granted upon that ground, it

must, of course, be dissolved as soon as the discovery is obtained.  
*S. C. 4 Dall. 3. Note (1.)*

15. Where the State of New-York filed a bill in this Court against the State of Connecticut, containing an historical account of the title of New-York to the soil and jurisdiction of a tract of land which had been granted by both States; alleging that the grantees of Connecticut had brought actions of ejectment in the Circuit Court against the grantees of New-York; setting forth an agreement of the 28th of November, 1683, between the two States (then colonies) on the subject; and praying a discovery, relief, and injunction to stay the proceedings in the ejectments: *Held*, that as the State of New-York was not a party to the suits below, nor interested in the decision of those suits, an injunction ought not to issue. *S. C. 4 Dall. 3.*

16. A Court of Equity will not interfere between a donee of land by deed, and a devisee under the will of the donor, in a case where there is no fraud. *Viers v. Montgomery*, 4 Cranch, 177.

17. A Court of Equity of the United States cannot grant an injunction to prevent a party from proceeding at law in a State Court. *Diggs v. Wolcott*, 4 Cranch, 179.

18. Where the plaintiff claimed title to lands in Georgia, under several mesne conveyances from the original patentee; and while the lands were the property of C., two judgments were rendered against him at the suit of H., for the sum of 4,556*l.* sterling. Executions were afterwards issued on the judgments, and levied on the lands of the plaintiff held under conveyances from the defendant C., made subsequent to the rendition of the judgments. The agent of the plaintiff gave the sheriff notice not to sell under the executions, alleging that the judgments were satisfied; but as he failed to take the steps prescribed in such case by the local laws, the sheriff proceeded to sell to M. and others. Upon a bill filed against C., H., and M., and others, to set aside the sale and conveyance made by the sheriff, and for general relief; *held*, that although the judgments constituted a legal lien on the lands in question, and the title at law passed

to the purchasers by the sheriff's sale and conveyance, yet that if the judgments, under which the legal estate was acquired, were, in fact, satisfied, and sufficient notice given to the purchasers to put them on their guard, the plaintiff would be entitled to relief. But the facts of the cause not supporting the plaintiffs' allegation, there being no sufficient evidence to show that there was not due, on the judgments obtained by H. against C., a sum more than equal to the value of the lands sold under executions, the plaintiffs had no equity against the purchasers of the lands, whose conduct appeared to have been perfectly unexceptionable, and the bill was consequently dismissed. *Field v. Holland*, 6 *Cranch*, 8. 20.

19. If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, cannot be disregarded. *Fletcher v. Peck*, 6 *Cranch*, 87. 133.

20. He who has equal equity, may acquire the legal estate, if he can, so as to obtain a superiority, and protect his equity. *Fitzsimmons et al. v. Ogden et al.* 7 *Cranch*, 2. 18.

21. On the question, whether a writing be a letter of credit, or on the construction of a letter of credit or guarantie, the rule is the same in a Court of Equity as in a Court of Law; and any explanatory fact which could be admitted in evidence in the one Court, would be received in the other. *Russell v. Clarke's executors*, 7 *Cranch*, 69. 89.

22. On the question of fraud, in such a case, the remedy at law is also complete; and in no case will a Court of Equity afford relief for an injury sustained by the fraud of a person who is no party to a contract induced by that fraud. *Ib.*

23. If, however, certain facts, essential to the merits of a claim purely legal, be exclusively within the knowledge of the party against whom that claim is asserted, he may be required, in a Court of Equity, to disclose those facts, and the Court being thus rightly in the possession of the cause, will proceed to determine the whole matter in controversy. *Ib.*

24. But this rule cannot be abused by being employed as a mere pretext for bringing causes, proper for a Court of Law, into a Court of Equity. *Russell v. Clarke's executors*, 7 Cranch, 69. 89.

25. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, he will be dismissed from the Court of Chancery, and permitted to assert his rights in a Court of Law. *Ib.*

26. But if a claim is to be satisfied out of a fund which is accessible only by the aid of a Court of Chancery, application may be made, in the first instance, to that Court, which will not, in that case, require that the claim should be first established in a Court of Law. *Ib.*

27. Notice of a prior incumbrance to an agent, is notice to the principal. *Astor v. Wells*, 4 Wheat. 466. 487.

### CHANCERY III.

*Trusts.* (A) *Ordinary trusts.* (B) *Mortgages.* (C) *Money considered as land, and land as money.* (D) *Lien of vendor for unpaid purchase money.*

#### (A) *Ordinary trusts.*

28. He who acquires the legal title, having notice of the prior equity of another, becomes a trustee for that other, to the extent of his equity. *Wilson v. Mason*, 1 Cranch, 100.

29. If the obligee of a bond obtain titles in his own name for part of the lands, the assignment of which to the obligor was the consideration of the bond, and suffer the titles to the residue of the lands to be lost by the non-payment of taxes, a Court of Equity will not lend its aid to carry into effect a judgment at law upon the bond, by a bill brought by the obligee against the executors of the obligor. *Skillern v. May's executors*, 4 Cranch, 137.

30. Equity will make that party *immediately liable* who is *ultimately liable* at law.

Thus, if an executor has distributed the estate of his testator, the creditor has an action at law against him, and he has his remedy against the legatees. But the creditor has no action at law against the legatees. He may, therefore, bring the executor and legatees both before a Court of Chancery, which Court will decree immediate payment from those who are ultimately bound. *Riddle v. Mandeville*, 5 *Cranch*, 322. 330.

31. If the executor, and his sureties, should be insolvent, so that a suit at law must be unproductive, the creditor would have no other remedy than in Equity, and his right to the aid of that Court could not be questioned. *Ib.*

32. The purchaser of an equitable interest, purchases at his peril, and acquires the property burdened with every prior equity charged upon it. *Skirras et al. v. Craig & Mitchell*, 7 *Cranch*, 34. 48. *Russell v. Clarke's executors*, 7 *Cranch*, 69. 97.

33. A person, for whose benefit a trust is created, who is to be the ultimate receiver of money, may sustain a suit in equity, to have it paid directly to himself. *Russell v. Clarke's executors*, 7 *Cranch*, 69. 97.

34. But if the state of things contemplated by the trust deed has not yet occurred, or if it does not appear that a prior trust has been satisfied, or its objects otherwise secured, the trust fund will not be directly applied for the use of the party for whose ultimate benefit it was intended.

As where a merchant had endorsed the bills of another, upon the faith of the guarantee of a third person, and the principal debtor having become insolvent, made an assignment in trust to pay the amount that should be recovered against, and paid by, the guarantee, a judgment was recovered against the guarantee, but he having also become insolvent, and no part of the judgment having been paid by him; it was held, that the state of things had not occurred, in which the party, who endorsed the bills upon the faith of the guarantee, could demand the execution of the trust, directly to himself. *Ib.*

35. So where, in the same deed of assignment, a prior trust had been created for the benefit of other parties, and it did not appear whether the prior trust had been satisfied, or its objects otherwise secured, it was held, that the trust fund could not be then applied directly for the benefit of the party who had endorsed the bills upon the faith of the guarantee. *Russell v. Clarke's executors*, 7 Cranch, 69. 97.

36. But if the trust be to pay the guarantee a sum which he is liable to pay to the creditor, who has relied upon the faith of the guarantee, and the trust be created in such terms that the money is certainly to be paid to the guarantee, equity will decree it to be paid directly to the creditor who has relied upon the guarantee. *Ib.*

37. The party who takes an assignment of a deed of assignment, in trust for certain purposes, takes it with notice of the trust, and is cloathed with the trust. He is a trustee for the same uses, and to the same extent, with his assignor.

Thus, where A. received an assignment from his insolvent debtor, of certain personalities, in trust, first, to repay himself any sums which he might pay on account of certain liabilities for the debtor, and, secondly, to pay B. all such moneys as he should be liable to pay as a guarantee for the insolvent debtor ; and A. transferred the assignment to C., another creditor of the insolvent, who had received another assignment of the property, subject to the lien of the first assignment, in consideration of being indemnified against his (A.'s) liability upon certain notes of the insolvent, it was held, that C., having taken the assignment with notice of the trusts, took it cloathed with the trusts ; and that he was a trustee for the same uses, and to the same extent with A. *Ib.*

38. H., in contemplation of marriage with B., gave a bond for 5,000 dollars and interest, to trustees, to secure to B. a support, during the marriage, and after the death of H., in case she should survive him, and to their child or children, in case he should survive her ; with condition that if H. should, within the time of his life, or within one year after the marriage, (whichsoever

of the said terms should first expire,) convey to the trustee some good estate, real or personal, sufficient to secure the annual payment of 300 dollars for the separate use of his wife during the marriage, and also sufficient to secure the payment of the said 5,000 dollars to her use in case she should survive her husband, to be paid within six months after his death ; and in case of her death before her husband, to be paid to their child or children ; or if H. should die before B., and by his will, should, within a year from its date, make such devises and bequests as should be adequate to those provisions, then the bond to be void. H. died, leaving his widow B. and a son, having, by his last will, devised a tract of 1,000 acres of land in the Mississippi territory to his son in fee ; a tract of 10,000 acres in Kentucky, equally between his wife and son, with a devise over to her in fee of the son's moiety, if he died before he attained "the lawful age to will it away." And the residue of his estate, real and personal, to be divided equally between his wife and son, with the same contingent devise over to her, as with regard to the tract of 10,000 acres of land. The value of the property thus devised to her, beside the contingent interest, might have been estimated, at the time of H.'s death, at 5,000 dollars. B. subsequently died, having made a nuncupative will, by which she devised all her estate, "whether vested in her by the will of her deceased husband or otherwise," to be divided between her son and the plaintiff, with a contingent devise of the whole to the survivor. The son afterwards died, the plaintiff brought his bill to charge the lands of H. with the payment of the bond for 5,000 dollars and interest, to which the plaintiff derived his right under the nuncupative will of B. By the laws of Kentucky this will did not pass her real estate, but was sufficient to pass her personal estate, including the bond.

*Held*, that the provision made in the will of H. for his wife, must be taken in satisfaction of the bond, but subject to her liberty to elect between the provision under the will and the bond ; and that this privilege was extended to her devisee, the plaintiff. *Hunter v. Bryant*, 2 Wheat. 32.

39. Actual maintenance is equivalent to a sum secured for separate maintenance; and, therefore, interest upon the bond during the husband's life time was not allowed in the above case. *Hunter v. Bryant*, 2 Wheat. 32.

40. Under all the circumstances of the above case, it was determined that the bond was chargeable on the residue of H.'s estate, and of this, the personality first in order. *Ib.*

41. Where all the property of the late bank of the United States, on the expiration of its character, had been assigned, by a general assignment, in trust, to assignees, for the purpose of liquidating its affairs: Quere, Whether any action at law could be maintained by the assignees, on certain promissory notes, endorsed to, and the property of the Bank, which had not been specially assigned nor endorsed to the assignees? *Lenox v. Roberts*, 2 Wheat. 373. 376.

42. However this may be, it is clear that a suit in Equity might be maintained by the assignees against the parties to the notes. *Ib.*

43. By the act of incorporation of the Union Bank of Georgetown, c. 86. s. 11. the shares of any individual stockholder are transferable only on the books of the bank, according to the rules (conformably to law) established by the president and directors; and all debts due and payable to the bank, by a stockholder, must be satisfied, before the transfer shall be made, unless the president and directors shall direct to the contrary: Held, that no person could acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank, under the act of incorporation, of which he is bound to take notice. *Union Bank v. Laird*, 2 Wheat. 390. 393.

44. A creditor may lawfully take and hold several securities for the same debt, and cannot be compelled to yield up either until the debt is paid; therefore, the bank, under the above character, has a right to take security from one of the parties to a

bill or note discounted by it, and also to hold the shares of another party as security for the same. *Union Bank v. Laird*, 2 Wheat. 390. 393.

(B) *Mortgages.*

45. A mortgage of land made by one who has a legal and equitable title to a moiety of the property which the mortgage purports to convey, passes only his legal or equitable interest, although he had a power from the person who held the residue of the legal, but not of the equitable, estate in the land, to sell and convey his right also; the mortgagor not having affected to convey any part of it under his power from the other person, although his deed purported to mortgage the whole; and the equitable title not being in the person who gave the power. *Skirras et al. v. Craig & Mitchel*, 7 Cranch, 34. 47.

46. It is not necessary to the validity of a mortgage that it should truly state the debt it is intended to secure; but it shall stand as a security for the real equitable claims of the mortgagee, whether they existed at the date of the mortgage, or arose afterwards upon the faith of the mortgage, before notice of the subsequent title of a *bona fide* purchaser. *Id.* 50.

47. If A. advance money to B., and B. thereupon convey land to trustees, in trust, to convey the same to A. in fee, in case B. should fail to repay the money and interest on a certain day; and B. fails to repay the money on that day, and the trustees thereupon convey the land to A., and there is, in the conveyance, no acknowledgment of a pre-existing debt, and no stipulation for the repayment of the money advanced, and no proposition for, or conversation about, a mortgage; it is not a mortgage, and B. has no equity of redemption. *Conway's executors v. Alexander*, 7 Cranch, 218. 235.

48. Two individuals may make a contract, for the purchase and sale of lands, defeasible by the payment of money at a future day, or, in other words, make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price, and at a specified time. *Ib.*

49. But as efforts are frequently made by the lenders of money to take advantage of the necessities of the borrower, in order to obtain unjust advantages, the leaning of Courts of Equity in such cases is against them, and doubtful cases are generally decided to be mortgages. *Conway's executors v. Alexander, 7 Cranch, 218. 235.*

50. As, however, a conditional sale, if really intended to be such, is valid, the inquiry in every case must be, whether the contract in the particular case is a security for the repayment of the money or an actual sale. *Ib.*

51. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended; but it is an important circumstance, for it is a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor, either reserved in express terms or somehow existing. *Ib.*

52. If the contract be not completely voluntary, as if made by a person in jail and much pressed for money, though this circumstance does not deprive a man of the right to dispose of his property, it gives a complexion to his contracts, and must have some influence in a doubtful case, in determining the conveyance to be a mortgage and not a sale. *Ib.*

53. A conditional sale, made in such a situation, at a price bearing no proportion to the value of the property, would bring suspicion on the whole transaction. *Ib.*

54. It seems, that excessive inadequacy of price would, in itself, in the case of a conditional conveyance, furnish irresistible proof that a mortgage, and not a sale, was intended. *Ib.*

55. A mortgagee, who knows that another person is about to lend money upon the mortgaged premises, and denies that he has a mortgage, or asserts that it is satisfied, will be postponed to the second mortgagee who is induced to lend the money by this concealment or misrepresentation. *Lee v. Munroe et al. 7 Cranch, 366. 368.*

56. But this rule only extends to a party who has himself an interest in the subject-matter of inquiry, but not so as to affect

the interests of principals through their agents, unless it appears that the agent was acting within the scope of his authority, and was empowered, as agent, to make the declaration or representation which is relied on as the ground of relief. *Lee v. Munroe et al.* 7 Cranch, 366. 368.

57. If three persons mortgage their joint property to indemnify the drawer of bills of exchange drawn for their accommodation, in case of non-acceptance; and if each of the mortgagors agrees to take up a third part of the bills upon their return protested, and if two of them neglect to take up their two thirds, whereby the other mortgagor is compelled to take up the whole of the bills, in consequence of which he requests the drawer not to discharge the mortgage, but to hold it for his benefit; a lien in equity is thereby created upon the mortgaged property to the amount of two thirds of the bills in favour of that mortgagor who took up the whole. *Pratt et al. v. Law & Campbell*, 9 Cranch, 456. 497.

*(C) Money considered as land, and land as money.*

58. Equity considers land, directed to be sold and converted into money, as money; and money directed to be employed in the purchase of land, as land. *Craig v. Leslie*, 3 Wheat. 563. 577.

59. Where the whole beneficial interest in the land in one case, or in the money in the other, belongs to the person for whose use it is given, a Court of Equity will permit the *cestui que trust* to take the money or land at his election, if he elect before the conversion is made. *Ib.*

60. But if the *cestui que trust* die, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done if the conversion had been made, and the trust executed in his life time. *Ib.*

61. *Land, devised to trustees, to sell for payment of debts and legacies, is to be deemed as money.* *Ib.*

62. The heir at law has a resulting trust in such lands, after

the debts and legacies are paid, and may come into Equity and restrain the trustee from selling more than sufficient to pay them; or may offer to pay them himself, and pray a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property in either case will be land and not money.

*Craig v. Leslie, 3 Wheat. 563. 577.*

63. But if the intent of the testator appears to have been to stamp upon the proceeds of the land directed to be sold, the quality of personality, not only for the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal. *Ib.*

64. Equity will extend the same privilege to the residuary legatee which is allowed to the heir, to pay the debts and legacies, and call for a conveyance of the real estate, or to restrain the trustees from selling more than is necessary to pay the debts and legacies. *Ib.*

65. The conclusion—which, in *Roper v. Radcliff, (9 Mod. 167.)* is deduced from the above principles, that in respect to the residuary legatee such a devise shall be considered as land in equity, though in respect to the creditors and specific legatees, it is deemed as money—denied. *Ib.*

66. R. C., a citizen of Virginia, being seized of real property in that State, made his will: “In the first place, I give, devise, and bequeath unto J. L.” and four others, “all my estate, real and personal, of which I may die seized and possessed in any part of America, in special trust, that the afore-mentioned persons, or such of them as may be living at my death, will sell my personal estate to the highest bidder, on two years credit, and my real estate on one, two, and three years credit, provided satisfactory security be given by bond and deed of trust. In the second place, I give and bequeath to my brother T. C.” an alien, “all the proceeds of my estate, real and personal, which I have herein directed to be sold, to be remitted to him, accordingly as the payments are made; and I hereby declare the aforesaid J. L.” and the four other persons, “to be my trustees and executors for the purposes aforesigned.” Held, that the legacy given to

T. C., in the will of R. C., was to be considered as a bequest of personal estate, which he was capable of taking for his own benefit, though an alien. *Craig v. Leslie*, 3 Wheat. 583. 577.

(D) *Lien of vendor for unpaid purchase money.*

67. The equitable lien of the vendor of land, for unpaid purchase money, is waived, by any act of the parties showing that the lien is not intended to be retained, as by taking separate securities for the purchase money. *Brown v. Gilman*, 4 Wheat. 255. 290.

68. An express contract, that the lien shall be retained to a specified extent, is equivalent to a waiver of the lien to any greater extent. *Ib.*

69. Where the deed itself remains an escrow until the first payment is made, and is then delivered as the deed of the party, and the vendor consents to rely upon the negotiable notes of the purchaser endorsed by third persons, for the residue of the purchase money, this is such a separate security as extinguishes the lien. *Ib.*

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*Specific performance.*

70. He who sells property on a description given by himself, is bound in equity to make good that description; and if it be erroneous in a material point, although the variance be occasioned by mistake, he must still remain liable for that variance. *McFerran v. Taylor*, 3 Cranch, 270. 281.

71. Where a party agreed to sell lands on *Hingston's Fork*, by mistake, which were in fact situated on *Slate Creek*, as he could not be compelled to perform his contract specifically by a conveyance of land on Hingston's Fork, an issue of *quantum damnificatus* was directed to ascertain the damages the plaintiff had sustained by the inability of the defendant to perform

his contract." MARSHALL, C. J. *dubitante*, although assenting to the general principles laid down by the Court, did not consider them applicable to the particular circumstances of the case, where the error in the description of the property was not only innocent in itself, but appeared at the time to be unimportant, and did not conduce to, or in any manner affect the making of the contract. The person claiming damages in such a case should, he thought, be left to his remedy at law. *M'Ferran v. Taylor*, 3 Cranch, 270. 281.

72. In equity, time may be dispensed with, if it be not of the essence of the contract. *Hepburn v. Auld*, 5 Cranch, 282. 275.

73. A vendor may compel a specific execution of a contract for the sale of lands, if he is able to give a good title at the time of the decree, although he had not a good title at the time, when, by the contract, the land ought to have been conveyed. *Ib.*

74. But a Court of Equity will not compel a specific performance, unless the vendor can make a good title to all the land contracted to be sold. *Ib.*

75. Where there is simply a deficiency in quantity, the contract will be decreed to be specifically performed upon the principle of compensation. *Ib.*

76. LIVINGSTON, J.: *dissentiente*, as to the above principles, although he concurred in the decree of the Court dismissing the bill. He would dismiss the bill, even if a good title could then be given by the complainants. This Court can no more dispense with punctuality, as to time, in any case, than with any other part of the agreement. In England, the lapse of time is disregarded in decreeing a specific execution of a contract for land, because there the lands have a known, fixed, and stable value; while in this country, the price is continually fluctuating and uncertain, and in almost every case time is a very material circumstance. *Ib.*

77. He also expressed his dissatisfaction with the rule of compensation; holding, that the Court could not in any case compel a specific performance on terms and conditions. It could not

compel a specific execution as to part, and give the purchaser damages for the non-conveyance of the residue. *Hepburn v. Auld, 5 Cranch, 262. 275.*

78. After a lapse of seven years, the Court refused to decree a specific performance of a contract, in the part execution of which, the plaintiffs, or those under whom they claim, had expended large sums of money, although the first default was on the part of the defendant, and although it was probable that the failure of the defendant in that respect had prevented the completion of the execution of the contract on the part of the plaintiffs; circumstances having so changed, that neither party could derive from the execution of the contract, all the benefits which were at first expected. *Pratt et al. v. Carroll, 8 Cranch, 471.*

79. Time is material as to the specific performance of a contract, wherever, from the change of circumstances, a specific performance, such as would answer the ends of justice between the parties, has become impossible. *Ib. Pratt et al. v. Law & Campbell, 9 Cranch, 456. 494.*

80. In a case where it would be difficult to ascertain the injury resulting from the breach of contract, or the sum in damages by which the injury might be compensated, the Court will not itself ascertain the damages, nor direct an issue of *quantum damnicatus*. *Pratt et al. v. Law & Campbell, 9 Cranch, 456. 493.*

81. Where a contract for the sale of land has been in part executed by a conveyance of a part of the land, and the vendor is unable to convey the residue, a Court of Equity will decree the repayment of a proportionate part of the purchase money, with interest. *Ib.*

82. A Court of Equity will, in general, decree a specific performance of an agreement for the sale of lands, if the vendor is able to make a good title at any time before the decree is pronounced; but the dismissal of a bill, brought by the vendor to enforce a specific performance, on account of a defect in the title, is a perpetual bar to a new bill brought for the same object; unless, perhaps, in a case where an original bill in the na-

ture of a bill of review might be entertained. *Hepburn et al. v. Dunlop et al.* 1 Wheat. 179. 195.

83. The inability of the vendor to make a good title at the time the decree is pronounced, though it forms a sufficient ground for refusing a specific performance, will not authorize a Court of Equity to rescind the agreement in a case where the parties have an adequate remedy at law for its breach. *Ib.*

84. The alienage of the vendee is an insufficient ground to entitle the vendor to a decree for rescinding a contract for the sale of lands, though it may afford a reason for refusing a specific performance as against the vendee. *Ib.*

85. But if the parties have not an adequate remedy at law, the vendor may be considered as a trustee for whoever may become purchasers under a sale by order of the Court, for the benefit of the vendee.

86. Where the vendor is indebted to the vendee, and the sale is made in order to pay the debt, the vendor must pay interest from the time the debt is liquidated until he makes a good title, and the vendee is accountable for the rents and profits from the time the title is perfected until the contract is specifically performed. *Ib.*

87. In order to obtain a specific performance of a contract, its terms should be so precise as that neither party can reasonably misunderstand them. If the contract be vague and uncertain, or the evidence to establish it be insufficient, a Court of Equity will not enforce it, but will leave the party to his remedy at law. *Colson v. Thompson*, 2 Wheat. 336. 341.

88. The plaintiff, who seeks for the specific performance of an agreement, must show that he has performed, or offered to perform, on his part, the acts which formed the consideration of the alleged undertaking on the part of the defendant. *Ib.*

sure of a mortgage of lands, although in all these cases the lands lie without the jurisdiction of the Court, provided the defendant resides, or is to be found within it. *Massie v. Watts*, 5 Cranch, 148. 158.

98. A State Court has no jurisdiction to grant an injunction staying the proceedings on a judgment of the Courts of the United States. *M'Kim v. Voorhies*, 7 Cranch, 279.

99. If an equitable title be merged in a grant, the party has no relief in Equity, although the grant be void, as being contrary to law. *Preston v. Tremble*, 7 Cranch, 354.

100. Courts of Equity have concurrent jurisdiction with Courts of Law in assigning dower; upon the ground, that partitions are made and accounts taken in Chancery, in a manner highly favourable to the great purposes of justice. *Herbert et al. v. Wren et al.* 7 Cranch, 370. 376.

101. So, where the lands are sold, and are in possession of the purchaser, who has not yet paid the purchase money, if the party entitled to dower is willing to leave the purchaser undisturbed, and to accept of a gross sum for her dower, instead of a third part of the land itself, a Court of Equity will take jurisdiction, and will not drive her into a Court of Law, and compel her to receive her dower in the lands themselves. *Ib.*

102. The remedies in the Courts of the United States, in Equity, are to be, not according to the practice of State Courts; but according to the principles of equity, as distinguished and defined in that country from which we derive our knowledge of those principles. *Robinson v. Campbell*, 3 Wheat. 212. 221.

103. Consistently with this doctrine, it may be admitted, that where, by the statutes of a State, a title, which would otherwise be deemed merely equitable, is recognized as a legal title, or a title which would be valid at law, is, under circumstances of an equitable nature, declared void, the right of the parties in such case may be as fully considered in a suit at law, in the Courts of the United States, as in any State Court. *Ib.*

104. Where M'R., a citizen of Kentucky, brought a suit in Equity, in the Circuit Court of Kentucky, against C. C., stated

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to be a citizen of Virginia, and E. J. and S. E., without any designation of citizenship; all the defendants appeared and answered; and a decree was pronounced for the plaintiff: it was held, that if a joint interest vested in G. C. and the other defendants, the Court had no jurisdiction over the cause. But that if a distinct interest vested in C. C., so that substantial justice (so far as he was concerned) could be done without affecting the other defendants, the jurisdiction of the Court might be exercised as to him alone. *Cameron v. M. Roberts*, 3 Wheat. 591.

105. The Circuit Court has jurisdiction, on a bill in Equity, filed by the United States against the debtor of their debtor, they claiming a priority under the act of 1799, c. 128. s. 65. notwithstanding the local law of the State where the suit is brought allows a creditor to proceed against the debtor of his debtor, by a peculiar process at law. *The United States v. Howland*, 4 Wheat. 108. 115.

106. The Circuit Courts of the Union have Chancery jurisdiction in every State; they have the same Chancery powers, and the same rules of decision in all the States. *Ib.*

107. On a bill of peace, if the case be clear, a Court of Equity will interpose to quiet the title, especially where a number of persons are interested in the settlement of the question, and numerous titles depend on it. *Alexander et al. v. Pendleton*, 8 Cranch, 462. 468.

## CHANCERY VII.

### *Chancery Practice.*

108. The general rule prescribed by statute, for this Court, in Chancery causes, is the adoption of that practice, which is founded on the usage of Courts of Equity constituted on similar principles; but the Court is authorized to make such deviations as are necessary to adapt its rules and process to the peculiar circumstances of this country, subject to the control of the legislature. *Grayson v. Virginia*, 3 Dall. 320.

109. Process of *subpoena*, issuing out of this Court in any suit in equity, must be served on the defendant sixty days before the return day of the process: and if the defendant, on such service, does not appear at the return day, the complainant is at liberty to proceed *ex parte*. *Grayson v. Virginia*, 3 *Dall.* 321. 335. *10th Rule of the Court*, 1 *Wheat.* xv.

110. A decree for the sale of mortgaged property, upon a bill to foreclose, is a final decree, from which an appeal will lie under the Judiciary Act of 1789, c. 20. s. 22. *Ray v. Law*, 3 *Cranck*, 179.

111. A plea in bar to a bill in equity, denying part of the material facts stated in the bill, is not good. A mere denial of facts is proper for an answer, but not for a plea. *Milligan v. Milledge*, 3 *Cranck*, 220.

112. The want of proper parties is not a good plea, if the bill suggests a sufficient reason for not making other parties, such as that they are out of the jurisdiction of the Court. *Ib.*

113. The want of proper parties is not a sufficient ground for dismissing the bill. It must stand over to make new parties. *Ib.*

114. The report of *auditors*, appointed by consent of parties in a suit in equity, is not in the nature of an award of arbitrators, but is like a report on a reference to a master, and may be set aside by the Court, although neither fraud, corruption, partiality, or gross misconduct, on the part of the auditors, be proved. *Field v. Holland*, 6 *Cranck*, 8. 21.

115. Without expressly revoking an order of reference to auditors, the Court may direct an issue to ascertain the facts. *Ib.*

116. A Court of Equity may ascertain the facts itself, if the testimony enables it to ascertain them, or if not, may either direct an issue, or refer the question to a master. *Ib.*

117. After directing an issue, the Court may proceed to a final decree, without the issue being tried, on the order directing it being set aside. An interlocutory decree, deciding the merits of the cause, is, in such case, an implied discharge of the order directing an issue. *Ib.*

118. The answer of a defendant, who is properly and neces-

sarily made a party to the suit, and against whom, in a possible state of things, a decree might have been rendered, is evidence against the plaintiff, although it be doubtful in the actual state of the case, whether a decree can be pronounced against such defendant. *Field v. Holland*, 6 Cranch, S. 24.

119. But the plaintiffs cannot avail themselves of the answer of a party, who, though nominally a defendant, is substantially a plaintiff; whose interest is their interest, who has the same object with themselves, and who is not charged in the bill with confederating to defraud them. His answer is not evidence against a co-defendant. *Ib.*

120. The answer of one defendant is evidence against other defendants claiming through him.

Thus where the plaintiffs claimed title to lands in Georgia under several mesne conveyances from the original patentee; and while the lands were the property of C., one of the defendants, two judgments were rendered against him at the suit of H., also a co-defendant, for the sum of 4,556*l.* sterling. Executions were afterwards issued on the judgments, and levied on lands of the plaintiffs held under conveyances from the defendant C., made subsequent to the rendition of the judgments. The agent of the plaintiffs gave the sheriff notice not to sell under the executions, alleging that the judgments were satisfied; but as he failed to take the steps prescribed in such case by the local laws, the sheriff proceeded to sell to M. and others, also defendants. Upon a bill filed to set aside the sale and conveyance made by the sheriff, and for general relief; held, that the answer of the defendant H., was evidence against the plaintiffs, and against the defendant M. and others; but that the answer of C. was not evidence against his co-defendants. *Ib.*

121. The incapacity of the Circuit Courts to proceed against any person residing within the United States, but not within the District for which the Court is holden, will justify them in dispensing, in an equity suit, with parties merely formal. *Russell v. Clarke's executors*, 7 Cranch, 69. 98.

122. But where the real merits of the cause cannot be deter-

mined without bringing before the Court, as defendants, parties who are not liable to be sued in the Circuit Court in conjunction with the other defendants, the suit cannot proceed, unless they will consent to make themselves parties. *Russell v. Clark's executors*, 7 Cranch, 60. 92.

123. An answer, responsive to the bill, is evidence in favour of the defendant. *Ib.*

124. A Court of Equity cannot award a writ of *habere facias possessionem* to enforce its decrees. *Wallen v. Williams*, 7 Cranch, 602.

125. Regularly, claimants to land, who have only an equitable title, ought to make those whose title they assert, as well as the person from whom they claim a conveyance, parties to the suit. For omitting to do so, an *original* bill may be dismissed. *Simms v. Guthrie et al.* 9 Cranch, 19. 25.

126. But a bill to enjoin a judgment at law, which has been rendered for the defendant in Equity against the plaintiff in Equity, is not an *original* bill. *Ib.*

127. If the judgment has been rendered in a Court of the United States, the bill must be brought in the Courts of the United States: and as the limited jurisdiction of those Courts might possibly create some doubts of the propriety of making citizens of the same State with the plaintiff, parties defendants; in such a case the Court may dispense with parties who would otherwise be required, and decree as between those before the Court, since its decree cannot affect those who are not parties to the suit. *Ib.*

128. If the execution of a material exhibit of the complainant, be not admitted by the defendant in his answer, who calls upon the complainant to make full proof thereof in the Court below, this Court will not presume that any other proof was made than what appears in the transcript of the record. *Drummond's administrators v. Magruder & Co.'s trustees*, 9 Cranch, 122. 125.

129. But if this Court perceive that an objection to testimony is merely technical, and was probably not made at all in the Court below, it will not dismiss the bill absolutely, but will remand the cause to the Court below for further proceedings. *Ib.*

130. The answer of one defendant in Chancery is not, in general, evidence against his co-defendant. *Clark's executors v. Van Riemsdyk*, 9 *Cranch*, 153. 156. *Leeds v. Marine Ins. Co.* 2 *Wheat.* 390. 388.

131. But this rule does not apply to the case where the defendants are all proved to be partners in the same transaction; for in such case, the answer of either is evidence against the others. *Clark's administrators v. Van Riemsdyk*, 9 *Cranch*, 153. 156.

132. The deposition of one defendant is not admissible in evidence against the others, although he had received his certificate of discharge under a State insolvent law, from all debts and contracts prior to the date of the discharge, and although the debt in suit was contracted prior to such discharge; the debt having been contracted in a foreign country with a foreigner. *Ib.*

133. It is the general rule, that either two witnesses, or one witness with probable circumstances, will be required to outweigh an answer asserting a fact responsively to the bill. *Ib.*

134. But there may be evidence arising from circumstances stronger than the testimony of any single witness. *Ib.*

135. And the weight of the answer must also, from the nature of evidence, depend, in some degree, on the fact stated. If a defendant asserts a fact which is not, and cannot be within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. *Ib.*

136. The general rule does not therefore apply to a case where the answer is outweighed by circumstances, or it is respecting a fact which in the nature of things cannot be within the personal knowledge of the defendant. *Ib.*

137. A denial by an executor, defendant, that his testator gave authority to A. to draw a bill of exchange, is not such an answer to an averment of such authority, as will deprive the plaintiff of his remedy; unless the defendant also deny the subsequent assent of his testator to the drawing of such bill. *Ib.*

138. For a subsequent assent is equivalent to an original authority. *Ib.*

139. It is not the Equity practice to order an *issue quantum damnificatus* in any case in which the Court can lay hold of a simple, equitable, and precise rule to ascertain the amount which it ought to decree. *Pratt et al. v. Law & Campbell*, 8 Cranch, 456. 494.

140. Causes in Equity cannot be removed by *writ of error* from the Circuit Court for re-examination in the Supreme Court. The appropriate mode of removing such causes is *by appeal*: and the rules, regulations, and restrictions contained in the 22d and 23d sections of the Judiciary Act of 1789, c. 20. respecting the time within which a writ of error shall be brought, and in what instances it shall operate as a *supersedeas*; the citation to the adverse party; the security to be given by the plaintiff in error for prosecuting his suit; and the restrictions upon the appellate Court as to reversals in certain enumerated cases, are applicable to appeals under the Judiciary Act of 1803, c. 353. [xciii.] and are to be substantially observed: except that when the appeal is prayed at the same term when the decree is pronounced, a citation is not necessary. *The San Pedro*, 2 Wheat. 132. 137.

141. The answer of an agent is not evidence against his principal, nor are his admissions *in pais*, unless they form a part of the *res gesta*. *Leeds v. Marine Ins. Co.* 2 Wheat. 380. 383.

142. Where a cause is set down for hearing on the bill, answer, and exhibits, without other pleadings, the whole of the answer must be considered as true. *Ib.*

143. The Circuit Courts have no power to set aside their decrees in Equity on motion, after the term at which they are rendered. *Cameron v. M'Roberts*, 3 Wheat. 591.

144. Upon a bill filed by the United States, proceeding against the debtor of their debtor for an account, &c. in order to enforce their priority, the original debtor to the United States ought to be made a party, and the account taken between him and his debtor. *The United States v. Howland*, 4 Wheat. 108. 117.

145. An appeal does not lie from an order or decree in Equi-

ty, of the Circuit Court, to this Court, unless it be a *final* decree. *Rutherford v. Fisher*, 4 *Dall.* 22.

146. A final decree cannot be pronounced until all the parties in interest are brought before the Court. *Marshall v. Beverley*, 5 *Wheat.* 313. 315.

147. Where a bill was filed for a perpetual injunction, on judgments obtained on certain bills of exchange drawn by the plaintiff and negotiated to the defendant, and which had subsequently passed from the latter into the hands of third person, by whom the judgments were obtained: *held*, that the injunction could not be decreed until their answers had come in, although the bill stated, and the defendant admitted, that he had paid the judgments, and was then the only person interested in them, because such statement and admission might be made by collusion. *Ib.*

148. In appeals to this Court, from the Circuit Courts, in Chancery cases, the parol testimony which may be heard at the trial in the Court below ought to appear in the record. *Coxin v. Penn*, 5 *Wheat.* 424.

149. A final decree, or an interlocutory decree which in a great measure decides the merits of the cause, cannot be pronounced, until all the parties to the bill, and all the parties in interest, are before the Court. *Ib.*

150. An agreement in a Court of Common Law, Chancery, or Prize, made under a clear mistake, will be set aside. *The Hiram*, 1 *Wheat.* 440. 444.

151. If an agreement be made to confess a judgment, or a judgment be actually confessed, a Court of Law will set it aside; and if the judgment be no longer in the power of a Court of Law, relief may be obtained in Chancery. *Ib.*

152. So also an agreement, entered into in a suit originally depending in a Court of Chancery, will be relaxed, or set aside, if it be proved to the Court to have been entered into under a mistake. *Ib.*

## CONSTITUTIONAL LAW.

- I. Authority to declare a legislative act unconstitutional, and general rules of interpretation.
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## CONSTITUTIONAL LAW I.

Authority to declare a legislative act unconstitutional, and general rules of interpretation.

1. An act of Congress, repugnant to the constitution, is void,

and cannot become the law of the land. *Marbury v. Madison*, 1 *Cranch*, 137. 176.

2. An act of Congress, repugnant to the constitution, does not bind the Courts, nor oblige them to give it effect. *Ib.*

3. If two laws conflict with each other, the Courts must decide on the operation of each. *Ib.*

4. So, if a law be in opposition to the constitution; if both apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the Court must determine which of these conflicting rules governs the case. *Ib.*

5. Under such circumstances, the constitution being superior to any ordinary act of the legislature, the constitution, and not such act, must govern the case to which they both apply. *Ib.*

6. The particular phraseology of our constitution confirms the principle which is essential to all written constitutions, that a law repugnant to the constitution is void: since, in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and those laws only which are made in pursuance of the constitution, have the rank of supreme law. *Ib.*

7. A contemporary exposition of the constitution, practised and acquiesced, under for a period of years, fixes the construction, and the Court will not shake or control it. *Stuart v. Laird*, 2 *Cranch*, 299. 309.

8. The constitution of the United States was ordained and established, not by the States in their sovereign capacities, but (as the preamble of the constitution declares) by the people of the United States. *Martin v. Hunter's lessee*, 1 *Wheat.* 304. 323. 352.

9. It was competent to the people to invest the national government with all the powers which they might deem proper and necessary; to extend or limit these powers at their pleasure, and to give them a paramount and supreme authority. *Ib.*

10. The people had a right to prohibit to the States the exercise of any powers which were, in their judgment, incompatible

with the objects of the general compact; to make the powers of the State governments, in given cases, subordinate to those of the nation; or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. *Martin v. Hunter's lessee*, 1 Wheat. 304. 323. 352.

11. The constitution was not, therefore, necessarily carved out of existing State sovereignties, nor a surrender of powers already existing in the State governments. *Ib.*

12. On the other hand, the sovereign powers vested in the State governments, by their respective constitutions, remain unaltered and unimpaired, except so far as they are granted to the government of the United States. *Ib.*

13. The government of the United States can claim no powers which are not granted to it by the constitution, expressly, or by necessary implication. *Ib.*

14. The constitution, like every other grant, is to have a reasonable construction, according to the import of its terms. The words are to be taken in their natural and obvious sense, and not in a sense either unreasonably restricted, or enlarged. *Ib.*

15. The powers granted to Congress are, not exclusive of similar powers existing in the States, unless where the constitution has expressly in terms given an exclusive power to Congress; or the exercise of a like power is prohibited to the States; or there is a direct repugnancy or incompatibility in the exercise of it by the States. *Houston v. Moore*, 5 Wheat. 1. 49. *Sturges v. Crowninshield*, 4 Wheat. 122. 192.

16. An example of the first class, is to be found in the exclusive legislation delegated to Congress over places purchased by consent of the Legislature of the State in which they shall be, for forts, arsenals, dock-yards, &c.; of the second class, the prohibition of a State to coin money, or emit bills of credit; of the third class, the power to establish an uniform rule of naturalization, and the delegation of admiralty and maritime jurisdiction. *Houston v. Moore*, 5 Wheat. 1. 49.

17. In all other classes of cases, the States retain concurrent authority with Congress. *Ib.*

18. But in cases of concurrent authority, where the laws of the States and of the Union are in direct and manifest collision on the same subject, those of the Union being the supreme law of the land, are of paramount authority, and the State laws, so far, and so far only, as such incompatibility exists, must necessarily yield. *Houston v. Moore*, 5 Wheat. 1. 49.

## CONSTITUTIONAL LAW II.

*Powers of Congress.* (A) *Implied powers.* (B) *Power to lay and collect taxes, duties, &c.* (C) *To establish an uniform rule of naturalization and uniform bankrupt laws.* (D) *To define and punish piracies and felonies committed on the high seas.* (E) *To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.* (F) *To provide for calling forth the militia, &c.* (G) *Exercise of other legislative powers.*

(A) *Implied powers.*

19. The acts of Congress, securing to the United States a priority of payment out of the effects of their debtor, in all cases of insolvency or bankruptcy, are constitutional. *United States v. Fisher*, 2 Cranch, 358. 396.

20. The government is to pay the debts of the Union, and is authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe. *Ib.*

21. It is no objection to the claim of priority on the part of the United States, that it interferes with the right of the State sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers. This result, so far as it may happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends. *Ib.*

22. Congress has power to incorporate a Bank. *McCulloch v. Maryland*, 4 Wheat. 316. 400.

23. The government of the Union is a government of the People; it emanates from them; its powers are granted by them; and are to be exercised directly on them, and for their benefit. *Ib.*

24. The government of the Union, though limited in its powers, is supreme within its sphere of action; and its laws, when made in pursuance of the constitution, form the supreme law of the land. *Ib.*

25. There is nothing in the Constitution of the United States, similar to the articles of Confederation, which exclude incidental or implied powers. *Ib.*

26. If the *end* be legitimate, and within the scope of the constitution, all the *means* which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect. *Ib. United States v. Fisher*, 2 Cranch, 358. 396.

27.. The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government. *McCulloch v. Maryland*, 4 Wheat. 316. 400.

28. If a certain means to carry into effect any of the powers expressly given by the constitution to the government of the Union, be an appropriate measure, not prohibited by the constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance. *Ib.*

29. The act of the 10th of April, 1816, c. 44., to "incorporate the subscribers to the Bank of the United States," is a law made in pursuance of the constitution. *Ib.*

30. The Bank of the United States has, constitutionally, a right to establish its branches or offices of discount and deposit within any State.

31. The State, within which such branch may be established, cannot, without violating the constitution, tax that branch. *McCulloch v. Maryland*, 4 Wheat. 316. 400.

32. The State governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers. *Ib.*

33.- The States have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government. *Ib.*

34. This principle does not extend to a tax paid by the real property of the Bank of the United States, in common with the other real property in a particular State, nor to a tax imposed on the proprietary interest which the citizens of that State may hold in this institution, in common with other property of the same description throughout the State. *Ib.*

(B) *Power to lay and collect taxes, duties, &c.*

35. The Constitution, art. 1. s. 8. declares, "that all duties, imposts, and excises, shall be uniform throughout the United States," and "that no capitation or other direct tax, shall be laid, unless in proportion to the census, or enumeration of the inhabitants of the United States." A tax on carriages is not a direct tax, and the act of the 5th of June, 1794, c. 221. [xlv.] laying duties upon carriages for the conveyance of persons, was constitutional. *Hylton v. The United States*, 3 Dall. 171.

36. The power of Congress to *lay and collect taxes, duties, &c.* extends to the District of Columbia and to the Territories of the United States, as well as to the States. *Loughborough v. Blake*, 5 Wheat. 317.

37. But Congress are not *bound* to extend a direct tax to the District and Territories. *Ib.*

38. The constitutional provision, that direct taxes shall be apportioned among the several States according to their respective numbers, to be ascertained by a census, was not intended to re-

strict the power of imposing direct taxes to States only. *Loughborough v. Blake*, 5 Wheat. 317.

39. The power of Congress to exercise exclusive jurisdiction in all cases whatsoever within the District of Columbia, includes the power of taxing it. *Ib.*

40. Congress has authority to impose a direct tax on the District of Columbia, in proportion to the census directed to be taken by the Constitution. *Ib.*

(C) *To establish a uniform rule of naturalization and uniform bankrupt laws.*

41. The power of naturalization is exclusively in Congress. *Chirac v. Chirac*, 2 Wheat. 259, 269.

42. A State has a right, since the adoption of the Constitution of the United States, to pass a bankrupt law, provided such law does not impair the obligation of contracts, and provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such law. *Sturges v. Crowninshield*, 4 Wheat. 122, 192.

43. Whenever the terms in which a power is granted by the Constitution to Congress, or whenever the nature of the power itself, require that it should be exercised exclusively by Congress, the subject is as completely taken away from the State legislatures, as if they had been expressly forbidden to act on it. But the power of Congress to establish uniform laws on the subject of bankruptcies is not of this description. *Ib.*

44. The right of the States to pass bankrupt laws is not extinguished by the enactment of a uniform bankrupt law throughout the Union, by Congress; it is only suspended so far as the two laws conflict. *Ib.*

*Et vide CONSTITUTIONAL LAW III.*

(D) *To define and punish piracies and felonies committed on the high seas.*

45. The act of the 3d of March, 1819, c. 76. s. 35. referring to the law of nations for a definition of the crime of piracy, is a constitutional exercise of the power of Congress to define and punish that crime. *United States v. Smith*, 5 Wheat. 153. 157.

*Et vide Constitutional Law V. (D)*

(E) *To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.*

46. War gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found ; the mitigation of this rigid rule, which the policy of modern times has introduced into practice, although it may affect its exercise, cannot impair the right itself ; and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. *Brown v. United States*, 8 Cranch, 109. 122.

47. But until that will is expressed by some legislative act, no power of condemnation can exist in the Court. *Ib.*

48. In this country, from the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war, can be sustained only upon the principle that they are commenced in execution of some existing law. *Ib.*

49. The declaration of war is not such a law : it does not, by its own operation, so vest the property of the enemy in the government, as to support proceedings for the seizure and confiscation of such property ; but it vests only a right, the assertion of which depends on the sovereign power. *Ib.*

50. In expounding the constitution of the United States, a construction ought not lightly to be admitted, which would give

to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us. *Brown v. United States*, 8 Cranch, 109. 122.

51. The declaration of war has only the effect of placing the two nations in a state of hostility, of giving those rights which war confers ; but not of operating by its own force, any of those results, (such as a transfer of property,) which are usually produced by ulterior measures of government. *Ib.*

52. The power of making "rules concerning captures on land and water," which is superadded in the constitution to that of declaring war, is not to be confined to captures which are extra-territorial ; but extends to rules respecting enemy property found within the territory ; and is an express grant to Congress of the power of confiscating enemy property, found within the territory at the declaration of war, as an independent substantive power, not included in that of declaring war. *Ib.*

53. The act of Congress, of June 18th, 1812, c. 425. [cii.] declaring war against Great Britain, does not enact a confiscation of enemy's property found within the territory of the United States, at the time of the declaration. *Ib.*

54. When war breaks out, the question what shall be done with enemy property in our country, is a question of policy, and is proper for the consideration of the legislative department, which can modify it at will ; not for the consideration of the judicial department, which can pursue only the law as it is written. *Ib.*

55. STORY, J. dissented from the opinion of the Court in the above case, upon the ground, that by virtue of the act declaring war the executive might authorize all captures and seizures, on land or water, within or without the territory, which are permitted and approved by the modern law of nations ; (except the confiscation of debts due to enemy subjects, which would require more express legislative provision;) that the declaration of war authorized the seizure and condemnation of enemy property

found in our parts at the declaration ; that the executive might authorize proceedings to enforce the confiscation of such property before the proper tribunals, and especially property *afloat on tide waters*, before the District Courts, as Courts of Admiralty jurisdiction, Prize, and Instance ; and that for this purpose the attorneys of the United States, whose proceedings must be presumed to be sanctioned by the proper authorities, until disavowed by them, are the agents of the government. *Brown v. United States*, 8 *Cranch*, 129. 147.

(F) *To provide for calling forth the militia, &c.*

56. The act of the State of Pennsylvania, of the 28th of March, 1814, (providing, sec. 21. that the officers and privates of the militia of that State, neglecting or refusing to serve, when called into actual service, in pursuance of any order or requisition of the President of the United States, shall be liable to the penalties defined in the act of Congress of the 28th of February, 1795, c. 277., [c.i.] or to any penalty which may have been prescribed since the date of that act, or which may hereafter be prescribed by any law of the United States ; and, also, providing for the trial of such delinquents by a State Court Martial, and that a list of the delinquents fined by such Court should be furnished to the marshal of the United States, &c., and also to the comptroller of the treasury of the United States, in order that the further proceedings directed to be had thereon by the laws of the United States might be completed,) is not repugnant to the constitution and laws of the United States. *Ib.*

(G) *Exercise of other legislative powers.*

57. Congress may make the revival of an act depend upon a future contingent event, and direct that event to be made known by a proclamation of the President. *The Aurora*, 7 *Cranch*, 382. 388.

58. When an act of Congress is revived by a subsequent act,

the legislature must be understood to give it, from the time of its revival, precisely that force and effect which it had at the moment when it expired. *The Aurora*, 7 *Cranch*, 382. 388.

59. A legislative declaration, that certain foreign edicts were repugnant to the law of nations, and a violation of the neutral rights of the United States, does not necessarily draw after it the consequence of annulling the sentences of foreign tribunals pronounced under such edicts. *Williams v. Armstrong*, 7 *Cranch*, 423. 433.

60. Congress being competent to make such a declaration, is competent to limit its operation, or to give it effect by such means as its own wisdom may suggest. *Ib.*

61. Had Congress, in the particular instance in question, declared that all sentences pronounced under these edicts should be considered as void, and incapable of changing the property they professed to condemn, this Court would give effect to such legislative declaration by recognising the title of the original owner. *Ib.*

62. But Congress not having thought fit to declare void the sentences of condemnation pronounced under these edicts, they retained the obligatory effect common to all sentences, whether erroneous or otherwise, that of binding the property on which they act. *Ib.*

### CONSTITUTIONAL LAW III.

*Prohibition to the States to pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.*

63. The prohibition in the constitution, art. 1. s. 9. 10. that no *ex post facto* law shall be passed by Congress, or by the State legislatures, is confined to criminal proceedings, and does not extend to contracts or civil rights of property. *Calder et ux. v. Bull et ux.* 3 *Dall.* 386. 396. 398.

64. A law or resolution of a State legislature, devesting the right to recover certain property which had vested in one party

in consequence of the decision of a Court of justice, and vesting it in another party by granting him a new trial before the same Court, which thereupon reversed its former decision, is not *ex post facto* law within the above prohibition. *Culder et ux. v. Ball et ux.* 3 Dall. 386. 396. 398.

65. The following are *ex post facto* laws within the words and intent of the constitutional prohibition: 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. That aggravates a crime, or makes it greater than it was, when committed. 3d. That changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. That alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of committing the offence, in, order to convict the offender. *Ib. Per Chase, J.*

66. *Quare.* Whether the legislature of any State can revise and correct, by a law, a decision of any of its Courts of justice, although not prohibited by the State constitution? *Ib.*

67. *Ex post facto* laws have an appropriate signification; they extend to penal statutes, and no further; they are restricted in legal estimation to the creation, and, perhaps, enhancement of crimes, pains, and penalties. *Ib. Per Patterson, J.*

68. Retrospective laws are inconsistent with sound legislation, and the fundamental principles of the social compact. *Ib. Per Chase, J.*

69. *Quare.* Whether a legislative act can be declared void by the Courts, because it is contrary to the principles of natural justice or of the social compact, unless it be expressly prohibited by the constitution? *Ib. Per Iredell, J.*

70. It seems, that the power of a State legislature is not absolute and without control; although its authority be not expressly restrained by the State or national constitution. *Ib. Per Chase, J.*

71. But a State might, before the establishment of the federal constitution, pass an act of attainder and confiscation, unless

expressly prohibited by its own local constitution. *Cooper v. Telfair*, 4 Dall. 14. 18.

72. If the title to property, founded upon private contract between two individuals, be deduced from a legislative act, which the legislature might constitutionally pass, and the act be cloathed with all the requisite forms of a law, a Court, sitting as a Court of law, cannot sustain a suit brought by one individual against another, founded on the allegation that the act is a nullity, in consequence of the corrupt motives which influenced certain members of the legislature by which the act was passed. *Fletcher v. Peck*, 6 Cranch, 87. 127. 131.

73. Quære, How far a Court of justice would, in any case, be competent, even on proceedings instituted by the State itself, to vacate a contract thus formed, and to annul rights acquired, under that contract, by third persons, having no notice of the improper means by which it was obtained? *Ib.*

74. So far as respects general legislation, it is a correct principle that one legislature is competent to repeal any act which a former legislature was competent to pass. *Ib.*

75. But when a law is in its nature a contract, and when absolute rights have vested under that contract, a repeal of the law cannot devest those rights. *Ib.*

76. Quære, Whether the nature of society, and of government, does not prescribe some limits to the legislative power, apart from the provisions of a written constitution; and if any such limits may be prescribed, whether the property of an individual, fairly and honestly acquired, may be seized without compensation? *Ib.*

77. However this may be as to a single, unconnected, sovereign power, whose legislature is not restricted by its own constitution; the legislative powers of the States of this Union are limited by the constitution of the United States, which declares, that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. *Ib.*

78. A grant, by the legislature of a State, to private indivi-

duals, of lands belonging to its public domain, is a contract, the obligation of which cannot be impaired by a subsequent legislative act. *Fletcher v. Peck*, 6 Cranch, 87. 127. 131.

79. The constitution using the general term "contracts," without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former; and, consequently, to include a grant; which is a contract executed. *Ib.*

80. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution, as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. *Ib.*

81. Where an estate has passed, under a grant from the State, into the hands of a purchaser, for a valuable consideration, without notice, the State is restrained, either by general principles, which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing an act whereby the estate so purchased could be impaired and annulled. *Ib.*

82. The nature of the Indian title to the lands in this country, though that title is to be respected by all Courts of justice, until it be lawfully extinguished, is not such as to be absolutely repugnant to a seizin in fee on the part of the State within whose boundaries the lands lie. *Fletcher v. Peck*, 6 Cranch, 87. 142.

83. An act of a State legislature, declaring that certain lands, purchased for the use of the Indians, in consideration of their relinquishing their claim to other lands within the State, should be forever exempt from taxation, and unalienable by the Indians without the authority of the legislature, formed a contract, the obligation of which could not be impaired by a subsequent legislative act, although the lands to which the privilege was annexed, were afterwards sold, with the assent of the State, by the Indians, to other individuals. *State of New-Jersey v. Wilson*, 7 Cranch, 164.

84. In the above case, the State might have insisted on a surrender of this privilege, as the sole condition on which a sale of the property settled on the Indians should be allowed; but the land having been sold, with the assent of the State, with all its privileges and immunities, the purchaser succeeded, with the same assent, to all the rights of the Indians, and was entitled to the benefit of the contract made with them. *State of New-Jersey v. Wilson*, 7 Cranch, 164.

85. The religious establishment of England, was adopted at a very early period in the colony of Virginia, and, of course, the common law upon that subject, so far as it was applicable to the circumstances of the colony. *Terrett v. Taylor*, 9 Cranch, 43. 46.

86. By the operation of the statutes made by the colonial legislature and the common law, upon the subject, the lands purchased for the use of the Episcopal Church, became vested, either directly, or beneficially, in the church. *Ib.*

87. The property, so acquired by the church, remained unimpaired notwithstanding the revolution; the statutes of Virginia of 1776, c. 2. of 1784, c. 83. of 1786, c. 12. and of 1788, c. 47. completely confirming and establishing the right of the church to all its lands and other property. *Ib.*

88. All these statutes were repealed by the ~~statute~~ of 1798, c. 9. as being inconsistent with the principles of the State constitution, and of religious freedom; and by the statute of 1801, c. 5. (which was passed after the District of Columbia was finally separated from the States of Maryland and Virginia,) the legislature asserted its right to all the property of the Episcopal Churches in the respective parishes of the State; and directed and authorized the Overseers of the Poor, in each parish, wherein any glebe land was vacant, or should become so, to sell the same, and appropriate the proceeds to the use of the poor of the parish.

*Held*, that the lands so attempted to be sold, still belong to the Episcopal Church of the parish where they are situate; and had not been rightfully devested by the revolution, or by any act

of the legislature passed since that period ; and that the Overseers of the Poor of the respective parishes have no just, legal, or equitable title to the same : but that the same may be sold, for the use of church, upon the application of the vestrymen and trustees, with the assent of the minister. *Terrett v. Taylor, 9 Cranch, 43, 46.*

89. The Episcopal Church, at the revolution, no longer retained its character as an exclusive religious establishment ; and it was competent for the people and the legislature to deprive it of its superiority over other religious sects, and to withhold from it any support by public taxation. *Ib.*

90. But the legislature might, consistently with the constitution, enact laws more effectually to enable all sects to accomplish the great objects of religion, by giving them corporate rights for the management of their property, and the regulation of their temporal, as well as spiritual concerns. *Ib.*

91. It is a principle of the common law, that the division of an empire creates no forfeiture of previously vested rights of property ; and the dissolution of the regal government no more devested the property of the Episcopal Church, and vested it in the State, than it did the property of any other corporation or individual. *Ib.*

92. But, even admitting that, by the revolution, the church lands devolved on the State, the statute of 1776, c. 2. operated as a new grant and confirmation thereof to the use of the Church. *Ib.*

93. If the legislature possessed the authority to make such a grant and confirmation, it vested an indefeasible and irrevocable title. *Ib.*

94. A private corporation created by the legislature may lose its franchises by a misuser or nonuser of them ; and they may be resumed by the government under a judicial judgment upon a quo warranto to ascertain and enforce the forfeiture. *Ib.*

95. Upon a change of government, such exclusive privileges, attached to a private corporation, as are inconsistent with the new government, may be abolished. *Ib.*

96. In respect to *public corporations*, which exist only for public purposes, such as counties, towns, cities, &c. the legislature may, under proper limitations, have a right to change, modify, enlarge, or restrain them; securing, however, the property for the use of those, for whom, and at whose expense, it was originally purchased. *Terrett v. Taylor*, 9 Cranch, 43. 46.

97. But the legislature cannot repeal statutes creating *private corporations*, or confirming to them property already acquired under the faith of previous laws, and by such repeal vest the property of such corporations exclusively in the State, or dispose of the same to such purposes as it may please, without the consent or assent of the corporators. *Ib.*

98. The statutes of 1798, c. 9. and of 1801, c. 5. are not therefore operative, so far as to devest the Episcopal Church of the property acquired, previous to the revolution, by donation or by purchase. *Ib.*

99. The statute of 1801, c. 5. so far as respects church lands in the District of Columbia, is liable to the further objection, that it passed after the District was taken under the exclusive jurisdiction of Congress; and as to the corporations and property within that District, the right of Virginia to legislate no longer existed. *Ib.*

100. And as to the statute of 1798, c. 9. admitting it to have the fullest operation, it merely repeals the statutes passed respecting the church since the revolution; and left in full force all the statutes previously enacted so far as they were not inconsistent with the present constitution. It left, therefore, their provisions, so far as respected the title to the church lands, in perfect vigour, with so much of the common law as attached upon those rights. *Ib.*

101. The common law of England in force at the emigration of our ancestors: was the birthright of the colonies, unless so far as it was inapplicable to their situation, or repugnant to their other rights and privileges. *A fortiori*, the principle applies to a royal province. *The Town of Pawlet v. Clark*, 9 Cranch, 292. 322. 333.

102. The common law, so far as it respected the erection of churches of the Episcopal persuasion of England, and the right to present, or collate to such churches, and the corporate capacity of the parsons thereof to take in succession, was recognized and adopted in New-Hampshire before the revolution. *The Town of Pawlet v. Clark, 9 Cranch, 292. 322. 333.*

103. At common law, the church of England, in its aggregate description, is not deemed a corporation, and cannot receive a donation *eo nomine*. *Ib.*

104. But a grant to the church of such a place is good at common law, and vests the fee in the parson and his successors. *Ib.*

105. A grant by the crown for the use of a non-existing parish church, may well take effect, by the common law, as a donation, *ad pios usos*. *Ib.*

106. After such a donation, it would not be competent for the crown to resume it at its own will, or alien the property without the same consent which is necessary to the alienation of other church property. *Ib.*

107. Under such circumstances, until a church should be legally erected, and a parson regularly inducted, the fee of the lands granted would remain in abeyance, or be like the *hereditas jacens* of the Roman law, in expectation of an heir. *Ib.*

108. A grant in the royal charter of a town in the province of New Hampshire, before the revolution, of "one share for a glebe for the Church of England, as by law established," did not entitle any Episcopal Church to the glebe, unless it was duly erected by the crown before the revolution, or by the State since; and by the revolution, the State succeeded to all the rights of the crown as to the unappropriated as well as the appropriated glebes. *Ib.*

109. By the operation of the several statutes of Vermont on the subject, and especially that of 1794, (which, so far as it granted the glebes reserved in the royal charters to the towns in that part of New Hampshire which was subsequently included in the State of Vermont, could not afterwards be repealed by the

legislature so as to divest the right of the towns under the grant,) the towns became respectively entitled to all the glebes situate therein, which had not been previously appropriated by the regular and legal erection of an Episcopal Church within the particular town. *The Town of Pawlet v. Clark, 9 Cranch, 292. 322. 333.*

110. The charter granted by the British crown to the trustees of Dartmouth College, in New Hampshire, in 1769, is a contract within the meaning of that clause of the constitution which declares, that no State shall make any law impairing the obligation of contracts. The charter was not dissolved by the revolution, and is protected by the constitution. *Dartmouth College v. Woodward, 4 Wheat. 518. 641. 657. 682. 651. 706.*

111. An act of the State legislature of New Hampshire, altering the charter of Dartmouth College, in a material respect, without the consent of the corporation, is an act impairing the obligation of the charter, and is unconstitutional and void. *Ib. 651. 664. 707.*

112. Under its charter, Dartmouth College was a private and not a public corporation. That a corporation is established for purposes of general charity, or for education generally, does not, *per se*, make it a public corporation, liable to the control of the legislature. *Ib. 631. 667.*

113. An act of a State legislature, which not only liberates the person of a debtor, but discharges him from all liability for any debt contracted previous to his discharge, on his surrendering his property in the manner it prescribes, so far as it attempts to discharge the contract, is a law impairing the obligation of contracts within the meaning of the Constitution of the United States, and is not a good plea in bar of an action brought upon such contract. *Sturges v. Crowninshield, 4 Wheat. 122. 192.*

114. The obligation of a contract is not fulfilled by a *cessio bonorum* or surrender of all the debtor's property. The parties have not merely in view the property in possession when the contract is formed, but its obligation extends to future acquisitions. *Ib.*

115. Although the States may, until that power is exercised by Congress, pass laws concerning bankrupts, yet they cannot constitutionally introduce into such laws a clause which discharges the obligations the bankrupt had entered into. *Sturges v. Crowninshield*, 4 Wheat. 122. 192.

116. There is a distinction between a law impairing the obligation of contracts, and a law modifying the remedy given by the legislature to enforce that obligation. *Ib.*

117. Imprisonment of the debtor is no part of the contract, and he may be released from imprisonment without impairing its obligation. *Ib.*

118. The act of Congress of 1800, c. 173. [xix.] s. 61. for establishing a uniform system of bankruptcy, does not confirm State insolvent laws containing a provision impairing the obligation of contracts; but merely leaves them to operate, so far as constitutionally they may, unaffected by the act of Congress, except so far as may respect persons and cases clearly within its purview. *Ib.*

119. The prohibition in the Constitution against the States making any law impairing the obligation of contracts, does not extend to paper money or tender laws, because these subjects are expressly provided for; nor is it to be limited to instalment or suspension laws, because the terms of the prohibition are general and comprehensive, and establish the principle of the inviolability of contracts in every mode. *Ib.*

120. Statutes of limitation and usury laws, unless retroactive in their effect, do not impair the obligation of contracts within the meaning of the Constitution. *Ib.*

121. A State bankrupt or insolvent law, (which not only liberates the person of the debtor, but discharges him from all liability for the debt,) so far as it attempts to discharge the contract, is repugnant to the Constitution of the United States; whether such law was passed before or after the debt was contracted. *M'Millan v. M'Neill*, 4 Wheat. 209.

122. The present Constitution of the United States did not commence its operation until the first Wednesday of March, 1789, and the provision in the Constitution, that "no State shall all

make any law impairing the obligation of contracts," does not extend to a State law enacted before that day, and operating upon rights of property vested before that time. *Owings v. Speed*, 5 Wheat. 420.

## CONSTITUTIONAL LAW IV.

*Authority of the President to appoint officers.*

123. The Constitution, art. 2. s. 2. provides, that "the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the Courts of Law, or in the heads of departments." Section 3. declares, that "he shall commission all the officers of the United States."

The act of the President in appointing to office, and commissioning the person appointed, are not one and the same act. *Marbury v. Madison*, 1 Cranch, 137, 155.

124. It seems, that although that clause of the Constitution which requires the President to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet Congress might apply it to the cases of officers appointed by the Courts of Law, or heads of departments. *Ib.*

125. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which could not, perhaps, legally be refused. *Ib.*

126. In the case of an appointment by the President, by and with the advice and consent of the Senate, the commission and the appointment seem inseparable: still the commission is not necessarily the appointment; though conclusive evidence of it. *Ib.*

127. The commission becomes complete evidence of the appointment, the instant it is shown that the President has done every thing to be performed by him. *Marbury v. Madison*, 1 *Cranch*, 137. 155.

128. The power of the executive over an officer, not removable at his will, ceases when the constitutional power of appointment has been exercised by the last act required from the President, the signature of the commission. *Ib.*

129. By the act of the 15th September, 1789, c. 14. s. 4. changing the department of foreign affairs into the department of State, the signature of the President is a warrant to the Secretary of State for affixing the great seal to a commission. *Ib.*

130. The commission being signed, the subsequent duty of the Secretary of State is prescribed by law, and cannot be guided or controlled by the will of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose. *Ib.*

131. Even supposing that the solemnity of affixing the seal to the commission is necessary to the completion of an appointment; still when the seal is affixed, the appointment is complete, without any other solemnity. *Ib.*

132. A delivery of the commission is not essential to its validity. *Ib.*

133. Nor is a transmission to, and acceptance by, the officer appointed, essential to the validity of the commission and the appointment. *Ib.*

134. The possession of the original commission is not indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. *Ib.*

135. A copy from the record in the office of the Secretary of State, is, to every intent and purpose, equal to the original commission. *Ib.*

136. When a commission is signed and sealed, the law orders the Secretary of State to record it; and whether the manual labour of inserting it in a book has been performed or not, it is in law recorded. *Ib.*

137. When an officer is removable at the will of the executive, the act by which he is appointed is at any time revocable; and the commission may be arrested, if still in the office. *Marbury v. Madison*, 1 *Cranch*, 137. 155.

138. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed. *Ib.*

139. To withhold a commission from an officer thus appointed, is an act not warranted by law. *Ib.*

140. In every case of the violation of a vested legal right, the law of the land affords a remedy to the injured individual. *Marbury v. Madison*, 1 *Cranch*, 137, 163.

141. The right to offices of trust, of honour, or of profit, is a vested legal right, entitled to the protection of the laws. *Ib.*

142. The act of withholding a commission, is not to be considered a mere political act, belonging to the executive department alone, for which the injured individual has no remedy. *Ib.*

143. There may be cases in which the conduct of a head of a department is not to be examined in a Court of justice. *Ib.*

144. The question, whether the legality of an act of a head of a department be examinable in a Court of justice, or not, must always depend on the nature of that act. *Ib.*

145. Where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or to act in cases in which the executive possesses a constitutional or legal discretion, their acts are only examinable politically. *Ib.*

146. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, the individual who considers himself injured has a right to resort to the laws of his country for redress. *Ib.*

147. The power of nominating to the Senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. *Ib.*

148. But when the President has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. *Marbury v. Madison*, 1 *Cranch*, 137. 163.

149. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. *Ib.*

150. But if the officer is, by law, not removable at the will of the President, the rights he has acquired are protected, and are not resumable by the President. *Ib.*

151. By signing a commission to a person as a justice of the peace for the District of Columbia, the President completes his appointment as such; the great seal of the United States affixed thereto by the Secretary of State, is conclusive evidence of the verity of the signature, and of the completion of the appointment; and the appointment confers on the justice a legal right to the office for the space of five years. *Marbury v. Madison*, 1 *Cranch*, 137. 168.

152. Having a legal right to the office, the justice has a consequent right to the commission; a refusal to deliver which is a violation of that right, for which the laws of his country afford him a remedy. *Ib.*

153. But to render a *mandamus* a proper remedy in such a case, the officer to whom it is directed must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy. *Ib.*

154. A *mandamus* to the Secretary of State is a proper remedy to enforce the delivery of a commission, or a copy of it from the record, to an officer who has been regularly appointed by the President. But this Court has no authority to issue the writ. *Ib.*

155. An action of *detinere* is not a specific legal remedy in such a case, because the judgment in *detinere* is for the thing itself, or its value. The value of a public office, not to be sold, is incapable of being ascertained; and the applicant has a right

ers, is not warranted by the constitution. *Marbury v. Madison*, 1 *Cranch*, 137. 173. 176.

169. Congress is not at liberty to give this Court appellate jurisdiction, where the constitution has declared that its jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate. *Marbury v. Madison*, 1 *Cranch*, 137. 174.

170. To enable this Court to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable this Court to exercise appellate jurisdiction. *Ib.*

171. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. *Ib.*

172. Although a *mandamus* may be directed to other Courts in the exercise of the appellate jurisdiction of this Court, yet to issue such a writ to an officer for the delivery of a paper, such as a commission to a public officer, is in effect the same as to sustain an original action for that paper, and therefore belongs not to appellate, but to original jurisdiction. *Ib.*

#### (B) Appellate jurisdiction of the Supreme Court.

173. The constitution provides, art. 3. s. 2. that "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have *original* jurisdiction. In all the other cases," (within the judicial power of the United States,) "the Supreme Court shall have *appellate* jurisdiction both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

Unless Congress has provided a rule to regulate the proceedings of this Court, as to its *appellate* jurisdiction, the Court cannot exercise that jurisdiction; and if a rule is provided by Congress, the Court cannot depart from it. *Wiscart v. Dauchy*, 3 *Dall.* 321. 327.

174. The general rule to be collected from an examination of

the powers vested in this Court, in causes of Equity, as well as in causes of Admiralty and maritime jurisdiction, prescribes to the Court an adoption of that practice which is founded on the custom and usage of Courts of Equity and Admiralty, constituted on similar principles; but still the Court is authorized to make such deviations as are necessary to adapt its process and rules to the peculiar circumstances of this country, subject to the interposition, alteration, and control of Congress. *Grayson v. Virginia*, 3 Dall. 320.

175. Two States cannot, by any compact between themselves respecting titles to land acquired under grants from one of them, oust this Court of the appellate jurisdiction given it by the constitution, and the judiciary acts, made in pursuance of the constitution. *Wilson v. Mason*, 1 Cranch, 45. 91.

176. The appellate jurisdiction of this Court does not extend to the decisions of the Circuit Court for the District of Columbia, or of the other Circuit Courts of the United States, in criminal cases. *Ib. The United States v. Moore*, 3 Cranch, 159. 172.

177. But where the opinions of the judges of the Circuit Court, (except that of the District of Columbia,) are opposed, in civil or criminal cases, the point may be certified to this Court for its decision. *Ib.*

178. The appellate jurisdiction of this Court extends to all cases in law and equity to which the judicial power of the United States extends, other than those cases which are within its original jurisdiction, "with such exceptions, and under such regulations, as the Congress shall make;" and had this Court been merely created by law, without describing its jurisdiction, the constitution would have been the only standard by which its powers could be tested. But as the jurisdiction of the Court has been affirmatively described by the judiciary act of 1789, c. 20. s. 13. 22. it has been regulated by Congress, and this regulation must be understood as prohibiting the exercise of other powers than those described. *Ib. Durousseau v. The United States*, 6 Cranch, 307. 312.

179. This Court has power to issue the writ of *habeas corpus ad subjiciendum*. *Ex parte Bollman & Swartwout*, 4 Cranch, 75. 93. 101.

180. This Court has appellate jurisdiction from the decision of the highest Court of law or equity of a State, in a case where the question is, whether a confiscation of the property of British subjects, under a law of the State, was complete, before the treaty of peace between the United States and Great Britain of 1783, the 6th article of which protects the titles of British subjects not actually confiscated. *Smith v. Maryland*, 6 Cranch, 286. 304.

181. In an action of ejectment between two citizens of a State, for lands in the State, if the defendant set up an outstanding title in a British subject, which he contends is protected by the treaty of 1794, and that therefore the title is out of the plaintiff; and the highest Court of law or equity of the State decide against the title thus set up, it is not a case in which a writ of error lies to this Court under the judiciary act of 1789, c. 20. s. 25. *Owings v. Norwood's lessee*, 5 Cranch, 344. 347, 348.

182. The words of the judiciary act must be restrained by the constitution, which (art. 3. s. 2.) extends the judicial power to all cases in law and equity arising "under treaties" made under the authority of the United States. This is not a case arising *under the treaty*; and whether the outstanding title be an obstacle to the plaintiff's recovery, is a question exclusively for the decision of the State Court. *Ib.*

183. But this Court has jurisdiction where the treaty is drawn in question, whether incidentally or directly. Whenever a right grows out of, or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the States; and whoever may have this right, it is to be protected. *Ib.*

184. But if the party's title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be protected by the treaty. *Ib.*

185. In the above case, if the British subject, in whom was supposed to have been vested the outstanding title protected by

the treaty, or his heirs, had claimed, it would have been a case arising under the treaty. But as neither his title, nor that of any person claiming under him, could be affected by the decision, it was not a case arising under a treaty. *Owings v. Norwood's lessee*, 5 Cranch, 344. 347, 348.

186. The appellate jurisdiction of this Court extends to a final judgment or decree in any suit in the highest Court of Law or Equity of a State, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such, their validity; or of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed, by either party, under such clause of the constitution, treaty, statute, or commission. *Martin v. Hunter's lessee*, 1 Wheat. 304. 323. 352.

187. Such judgment of the highest Court of a State may be re-examined in this Court by writ of error, in the same manner as if rendered in a State Court. *Ib.*

188. If the cause has been once remanded before, and the State Court decline or refuse to carry into effect the mandate of this Court, this Court will proceed to a final decision of the same, and itself award execution thereon. *Ib.*

189. If the validity or construction of a treaty of the United States is drawn in question in the State Court, and the decision is against its validity, or the title specially set up by either party under the treaty, this Court has jurisdiction to ascertain that title, and determine its legal validity, and is not confined to the abstract construction of the treaty itself. *Ib.*

190. The constitution, art. 3. s. 1. declares, that "the judicial power of the United States shall be vested in one Supreme Court, and in such other inferior Courts as the Congress may,

from time to time, ordain and establish." The second section declares, that "the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of Admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under the grants of different States; and between a State or the citizens thereof, and foreign States, citizens, or subjects." It then proceeds to declare, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

The language of the above article of the constitution is mandatory upon the legislature. Congress cannot lawfully refuse to create a Supreme Court, and to vest in it the whole constitutional jurisdiction. *Martin v. Hunter's lessee*, 1 Wheat. 304. 323. 352.

191. Congress is also bound to create some inferior Courts, in which to vest all that jurisdiction, which, under the constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance. *Ib.*

192. It seems, there is a distinction between the first class of cases enumerated in the above article, including cases arising under the constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers and consuls; and cases of Admiralty and maritime jurisdiction: and the second class embracing all the other subjects of national cognizance. In respect to the first class, the constitution imperatively extends the judicial power, either in an original or appellate form, to all

cases ; and in the second class of *controversies*, it leaves it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate. *Martin v. Hunter's lessee*, 1 Wheat. 304. 323. 352.

193. The judicial power of the United States is unavoidably, in some cases, exclusive of all State authority ; and in all others may be made so at the election of Congress. *Ib.*

194. No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to State tribunals. *Ib.*

195. The Admiralty and maritime jurisdiction, which embraces all questions of prize and salvage, and also maritime torts, contracts, and offences, is of the same exclusive cognizance. *Ib.*

196. It is only in those cases where, previous to the formation of the constitution, State tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. *Ib.*

197. The *appellate jurisdiction* of this Court may be exercised in all other cases than those in which it has *original jurisdiction*, and there is nothing in the constitution to restrain its exercise over State tribunals in the enumerated cases. *Ib.*

198. Where a cause is brought to this Court, by writ of error, or appeal, from the highest Court of law or equity of a State, under the 25th section of the Judiciary Act of 1789, c. 20. upon the ground, that the validity of a statute of the United States was drawn in question, and that the decision of the State Court was against its validity, &c. or that the validity of a statute of the State was drawn in question, as repugnant to the constitution of the United States, and the decision was in favour of its validity ; it must appear, from the record, that the act of Congress, or the constitutionality of the State law, was drawn into question. *Miller v. Nicholls*, 4 Wheat. 311. 316.

199. But it is not required that the record should, in terms, state a misconstruction of the act of Congress; or that it was drawn into question. It is sufficient to give this Court jurisdic-

tion of the cause, that the record should show that an act of Congress was applicable to the case. *Miller v. Nichols*, 4 Wheat. 311. 316.

200. Under the judiciary act of 1789, c. 20. s. 25. giving appellate jurisdiction to this Court, from the final judgment or decree of the highest Court of law or equity of a State, in certain cases, the writ of error may be directed to any Court of the State in which the record and judgment on which it is to act may be found; and if the record has been remitted by the highest Court, &c. to another Court of the State, it may be brought by the writ of error from that Court. *Gelston v. Hoyt*, 3 Wheat. 246. 303.

(C) *Jurisdiction of the other Courts of the United States at common law and in equity.*

201. The remedies in the Courts of the United States, at common law and in equity, are to be, not according to the practice of State Courts, but according to the principles of common law and equity, as defined in England. *Robinson v. Campbell*, 3 Wheat. 212. 221.

202. Congress has constitutional authority to establish, from time to time, such tribunals, inferior to the Supreme Court, as it may think proper; and to transfer a cause from such inferior tribunal to another. *Stuart v. Laird*, 2 Cranch, 299. 308.

203. The judges of the Supreme Court have a right to sit as circuit judges, although they are not appointed as such, or, in other words, have no distinct commissions for that purpose; the practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, having fixed the construction of the constitution in this respect. *Ib.*

204. Although the constitution extends the judicial power of the United States to all cases arising under the laws of the United States, Congress has not thought proper to delegate the exercise of that power to the Circuit Courts of the Union, except in certain specified cases. *M'Intire v. Wood*, 7 Cranch, 505.

205. When questions arise under the laws of the United States in the State Courts, and the party who claims a right or privilege under them, is unsuccessful, an appeal or writ of error is given to this Court, and this provision Congress has thought sufficient at present for all the political purposes intended to be answered by the clause of the constitution which relates to this subject. *M'Intire v. Wood*, 7 Cranch, 505.

206. The power of the Circuit Courts of the United States to issue the writ of *mandamus*, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. *Ib.*

207. Had the 11th section of the judiciary act of 1789, c. 20. covered the whole ground of the constitution, there would be reason for exercising the power of issuing the writ of *mandamus* in cases wherein some ministerial act is necessary to the completion of a private right arising under the laws of the United States, and the 14th section of the same act would sanction the issuing of the writ for such a purpose. *Ib.*

208. But as the law stands, the Circuit Courts have no power to issue the writ of *mandamus*, where it is not necessary to the exercise of their jurisdiction, as defined by the judiciary act; as, for example, to the register of a land office, commanding him to issue a final certificate of purchase to the purchaser of public lands. *Ib.*

209. The constitutional provision, which gives to aliens and citizens of different States the privilege of suing in the Courts of the United States, is limited and restrained by the judiciary act of 1789, c. 20. §. 11. which "declares that no District or Circuit Court shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favour of an assignee, unless a suit might have been prosecuted in such Court, to recover the said contents, if no assignment had been made."

Under this section of the judiciary act, the syndics or assignees of an insolvent debtor, under a general assignment of all his effects, are prevented from suing in the Circuit Court for the

recovery of the debts due to the assignor, unless he could have sued in the same Courts for the recovery of the same debts. *Sere v. Petot*, 6 *Cranch*, 832. 334.

210. The words of the above section of the judiciary act apply as well to book accounts or unliquidated claims, as to a promissory note, or other chose in action, assignable by the proprietor thereof; and to equitable assignments, as well as to legal assignments; and to assignments made by operation of law, as well as to assignments made by act of the party. *Ib.*

211. The 11th amendment to the constitution, which exempts the States from being sued in the Courts of the Union, does not oust those Courts of their jurisdiction in a cause, although the claims of a State to the subject which forms the matter of controversy between individuals may be ultimately affected by the decision of the cause. *The United States v. Peters*, 5 *Cranch*, 115. 139.

212. A State cannot be made a defendant to a suit brought by an individual; but it remains the duty of the Courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is not necessarily a defendant. *Ib.*

213. The Courts of the United States have no jurisdiction in a suit brought by an alien against an alien; and the judiciary act of 1789, c. 20. s. 11. which gives jurisdiction to the Circuit Court of suits "where an alien is a party," must receive a construction consistent with the constitution; the legislative power of conferring jurisdiction on the federal Courts being, in this respect, confined to suits between citizens and aliens. *Mossman v. Higginson*, 4 *Dall.* 12. 14.

214. The constitution, art. 3. s. 2. declares, that the judicial power shall extend to controversies "between citizens of different States," "and between a State, or the citizens thereof, and foreign States, citizens, or subjects."

It is not sufficient, in order to give jurisdiction to the Courts of the United States, to describe the parties as inhabitants of, or resident, or domiciled in different States, or in a foreign coun-

try; but they must be distinctly shown to be citizens of different States, or aliens. *Bingham v. Cabot*, 3 Dall. 382. *Turner v. Enrille*, 4 Dall. 7. *Mossman v. Higginson*, 4 Dall. 12. *Course v. Stead*, 4 Dall. 22.

215. A corporation aggregate cannot sue or be sued in the Courts of the United States, unless the natural persons of which it is composed are all entitled to that privilege, and are so described in the proceedings. *Hope Ins. Co. v. Boardman*, 5 Cranch, 57. 61.

216. But if the corporation be entirely composed of citizens of one State, or of aliens; and be so described in the proceedings, it may sue citizens of another State, or be sued by them, in the Courts of the Union. *Bank of the United States v. Devereaux*, 5 Cranch, 61. 86.

217. A citizen of the District of Columbia cannot maintain an action against a citizen of Virginia, in the Circuit Court for the District of Virginia. *Hepburn v. Ellzey*, 2 Cranch, 445. 452.

218. The District of Columbia is a distinct political society, and is therefore "a State," according to the definitions of writers on public law; but it is not "a State" in the sense of that word as used in our constitution.

219. The word "State," as used in the constitution, only extends to the members of the Union. *Ib.*

220. Congress may extend the privilege of suing in the Courts of the United States, which is enjoyed by aliens and by the citizens of every State in the Union, to the citizens of the District of Columbia, which is subject to the jurisdiction of Congress; but this is a subject for legislative, not for judicial consideration. *Ib.*

221. A citizen of a Territory cannot sue a citizen of a State in the Courts of the Union; nor can those Courts take jurisdiction by other parties being joined, who are capable of suing. All the parties on each side must be subject to the jurisdiction, or the suit will be dismissed. *Corporation of New-Orleans v. Winter*, 1 Wheat. 91. 94. *Strawbridge v. Curtis*, 3 Cranch, 262.

222. The jurisdiction of the Circuit Court, having once vested between citizens of different States, cannot be divested by a change of domicil of one of the parties, and his removal into the same State with the adverse party, *pendente lite*. *Morgan's heirs v. Morgan*, 2 Wheat. 290. 297.

223. The jurisdiction of the Circuit Court of the United States extends to a case between citizens of Kentucky, claiming lands, under different grants, the one issued by the State of Kentucky, and the other by the State of Virginia, but upon warrants issued by Virginia, and locations founded thereon prior to the separation of Kentucky from Virginia. It is the grant which passes the legal title to the land, and if the controversy is founded upon the conflicting grants of different States, the judicial power of the United States extends to the case, whatever may have been the equitable title of the parties prior to the grant. *Calson v. Lewis*, 2 Wheat. 377. *The town of Pawlet v. Clark*, 9 Cranch, 292. 322.

224. The State legislatures cannot annul the judgments of the Courts of the United States, nor destroy the rights acquired under those judgments. *The United States v. Peters*, 5 Cranch, 115. 136.

225. The State legislatures cannot determine the jurisdiction of the Courts of the Union. *Ib.*

226. A State Court of Equity has no jurisdiction to enjoin a judgment of the Circuit Court of the United States. *M'Kim v. Voorhees*, 7 Cranch, 279.

#### (D) *Admiralty jurisdiction.*

227. The constitution declares, art. 3. s. 2. that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction."

An information against a vessel for exporting arms and ammunition, contrary to the act of Congress of the 22d of May, 1794, c. 209. is a civil cause of admiralty and maritime jurisdiction; and no jury is necessary in such a case; it is to be tried by

the Court; and carried from the District to the Circuit Court by appeal. *The United States v. La Vengeance*, 3 Dall. 297. 301.

228. Informations *in rem* for a breach of the revenue laws, and other laws of trade, are causes of admiralty and maritime jurisdiction. *The Sally*, 2 Cranch, 406. *The Betsey & Charlotte*, 4 Cranch, 443. *The Samuel*, 1 Wheat. 9. *The Octavia*, Ib. 20.

229. The Courts of the United States have exclusive jurisdiction of all seizures made on land or water for a breach of the laws of the United States; and any intervention of a State authority, which by taking the thing seized out of the hands of the United States officer, might obstruct the exercise of this jurisdiction, is unlawful. *Slocum v. Mayberry*, 2 Wheat. 1. 9.

230. In such a case, the Court of the United States, having cognizance of the seizure, may enforce a re-delivery of the thing, by attachment, or other summary process. *Ib.*

231. The question under such a seizure, whether a forfeiture has been actually incurred, belongs exclusively to the Courts of the United States; no action for the seizure can be brought in a Court of common law before their decision *in rem*; and it depends upon the final decree of those Courts whether the seizure is to be deemed rightful or tortious. *Ib. Gelston v. Hoyt*, 3 Wheat. 246. 311.

232. If the seizing officer refuse to institute proceedings to ascertain the forfeiture, the proper Court of the United States may, upon application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure. *Slocum v. Mayberry*, 2 Wheat. 1. 9.

233. And if the seizure be finally adjudged wrongful, and without probable cause, the party may proceed, at his election, by a suit at common law, or in the Instance Court of Admiralty, for damages for the illegal act. *Ib.*

234. But the common law remedy in such a case must be sought for in the State Courts; Congress having refused to the Courts of the United States jurisdiction to decide on the conduct

of their officers, in the execution of their laws, in suits at common law, until the case shall have passed through the State Courts. *Slocum v. Mayberry*, 2 Wheat. 1. 9.

235. The constitution, art. 3. s. 2. provides, that "the trial of all crimes, except in cases of impeachments, shall be by jury, and such trial shall be in the State where the said crimes shall have been committed ; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

The clause of the act of April 30th, 1790, c. 36. [ix.] s. 8. which provides, that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may be first brought"—applies only to offences committed on the high seas, or in some river, haven, basin, or bay, not within the jurisdiction of a particular State, and does not apply to the Territories of the United States, where regular Courts for the trial of offences are provided by Congress. *Ex parte Bollman & Swartwout*, 4 Cranch, 75. 135.

236. Admitting that the 3d article of the constitution, which declares, that "the judicial power shall extend to all cases of Admiralty and Maritime Jurisdiction,"—vests in the United States exclusive jurisdiction of all such cases, and that a murder committed in the waters of a State where the tide ebbs and flows, is a case of Admiralty and Maritime Jurisdiction ; Congress have not so exercised this power, by law, as to confer on the Courts of the United States jurisdiction of such murder. *The United States v. Bevans*, 3 Wheat. 336. 386.

237. The grant to the United States, in the constitution, of all cases of Admiralty and Maritime Jurisdiction, does not extend to a cession of the waters in which those cases may arise, or of general jurisdiction over the same. *Ib.*

238. Congress may pass all laws which are necessary for giving the most complete effect to the exercise of the Admiralty and Maritime Jurisdiction, granted to the government of the Union : But the general jurisdiction over the place, subject to

this grant, adheres to the territory as a portion of territory not yet given away; and the residuary powers of legislation still remain in the State. *The United States v. Bevans*, 3 Wheat. 338. 398.

239. Congress has power to provide for the punishment of offences committed by persons serving on board a ship of war of the United States, wherever that ship may be. But Congress has not exercised that power in the case of a ship lying in the waters of the United States. *Ib.*

240. The Courts of the United States have no jurisdiction, under the act of April 30th, 1790, c. 36. [ix.] of the crime of manslaughter, committed by the master upon one of the seamen on board a merchant vessel of the United States, lying in the river Tigris, in the empire of China, 35 miles above its mouth, off Wampoo, about 100 miles from the shore, in four and a half fathoms water, and below low water mark. *United States v. Wilbergen*, 5 Wheat. 76. 93.

241. A vessel lying in an open road-stead of a foreign country, is "upon the high seas," within the act of 1790, c. 36. [ix.] s. 8. *United States v. Furlong*, 5 Wheat. 200.

## CONSTITUTIONAL LAW VI.

### *Treason against the United States.*

242. The constitution declares, art. 3. s. 3. that "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

A mere conspiracy to subvert, by force, the government of the country, is not treason. *Ex parte Bollman & Swartwout*, 4 Cranch, 75. 126.

243. To constitute a levying war, there must be an assemblage of persons designed to effect by force a treasonable purpose. The mere enlistment of men for such a purpose is not sufficient. *Ib.*

244. It is not necessary that an individual should appear in arms against his country to constitute the guilt of treason. *Ex parte Bollman & Swartwout*, 4 Cranch, 75. 126.

245. If war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a reasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. *Ib.*

246. Crimes which have for their object the subversion of the laws and institutions, which have been ordained in order to secure the peace and happiness of society, may receive such punishment as the legislature shall prescribe, although they do not amount to treason. *Ib.*

247. A design to overturn the government of the United States, established in a particular territory, by force, if carried into effect, would be treason ; and the assemblage of a body of men for the purpose of carrying it into execution, would amount to levying war against the United States ; but no conspiracy for this object, or enlisting of men to effect it, would be an actual levying war. *Ib.*

248. The travelling of individuals to the place of rendezvous would not, perhaps, constitute such an assemblage as would involve the guilt of treason ; but the meeting of particular bodies of men, and their marching from places of partial, to a place of general rendezvous, would be such an assemblage. *Ib.*

### CONSTITUTIONAL LAW VII.

*Faith and credit to be given to ; manner of proving ; and effect of public acts, records, and judicial proceedings.*

249. The constitution, art. 4. s. 1. declares, that " Full faith and credit shall be given, in each State, to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which

such acts, records, and proceedings shall be proved, and the effect thereof."

The act of May 28th, 1790, c. 38. [xi.] provides the manner of authenticating such acts, records, &c. and declares, that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every Court within the United States, as they have by law or usage, in the Courts of the State, from whence the said records are, or shall be, taken."

Under this clause of the constitution and act of Congress, if a judgment has the effect of record evidence in the Courts of the State from which it is taken, it has the same effect in the Courts of every other State; and the plea of *nil debet* is not a good plea to an action brought upon such judgment in a Court of another State. *Mills v. Duryee*, 7 Cranch, 481. 483. *Hampton v. M'Connel*, 3 Wheat. 234.

250. The common law gives to a judgment of the Courts of one State, the effect of *prima facie* evidence in the Courts of every other State; but the constitution contemplates a power in Congress to give a *conclusive effect* to such judgments, which power it has exercised by declaring a judgment conclusive when the Courts of the particular State where it is rendered would pronounce the same decision. *Ib.*

### CONSTITUTIONAL LAW VIII.

*Extent of the provision that Treaties shall be the supreme law of the land.*

251. The provision in the constitution, art. 6. s. 2., that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land,"—applies to treaties subsisting at the time of the ratification of the constitution, as well as those since made; and works a repeal of so much of all State laws and constitutions as are repugnant to such treaties. *Ware v. Hylton et al.* 3 Dall. 199. 236. 276. 282. 284.

252. The constitution declaring a treaty to be the supreme law of the land, it is as obligatory upon the Courts as an act of Congress; and if the treaty intervenes, subsequent to a decree of an inferior Court, and changes the rule under which that decree was pronounced, the decree must be reversed in the appellate Court. *United States v. The Peggy*, 1 Cranch, 103. 108.

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## CORPORATION.

- I. *Different kinds of corporations, their rights and capacities.*
- II. *Contracts by corporations.*

## CORPORATION I.

*Different kinds of corporations, their rights and capacities.*

1. At common law, the Episcopal Church was capable of receiving endowments of land, and the minister of the parish was, during his incumbency, seized of the freehold of its property, as *persona ecclesiæ*, and capable, as a sole corporation, of transmitting it to his successors. *Terrett et al. v. Taylor et al.* 9 Cranch, 43. 46. 53.

2. The churchwardens were a corporate body, clothed with authority and guardianship over the repairs of the church and its personal property. *Ib.*

3. But the churchwardens were not a corporation for the purpose of holding lands. Their capacity was limited to personal estate. *Ib.*

4. A deed of lands to the churchwardens and their successors could not, therefore, operate, by way of grant, to convey a fee; but a covenant of general warranty in the deed, binding the grantors and their heirs for ever, and warranting the land to the churchwardens and their successors for ever, might well operate,

by way of *estoppel*, to confirm to the church and its privies the perpetual and beneficial estate in the land. *Terrett et al. v. Taylor et al.* 9 *Cranck*, 43. 46. 53.

5. But no alienation of the church lands could be made without the consent of the minister. *Ib.*

6. At common law, the Church of England, in its aggregate description, is not deemed a corporation. *The Town of Paullet v. Clark et al.* 9 *Cranck*, 292. 325.

7. The Church of England is incapable of receiving a donation, *eo nomine*. *Ib.*

8. But the Church of England of a particular parish or place is a corporation for certain purposes, although incapable of asserting its rights and powers except by its parson regularly inducted. *Ib.*

9. In this respect it may be likened to certain other aggregate corporations acknowledged in law, whose component members are civilly dead, and whose rights may be effectually vindicated through their established head, though during a vacancy of the headship they remain inert; such are the common law corporations of abbot and convent, and prior and monks of a priory. *Ib.*

10. In general, to make a grant valid, there must be a person *in esse* capable of taking it. But land, at common law, may be granted *ad pios usos*, before there is a grantee in existence competent to take it; and in the mean time, the fee will remain in abeyance, or be like the *hæreditas jacens* of the Roman law, in expectation of an heir. *Ib.*

11. Thus, land might be given to endow a parochial church, before such church had a legal existence by consecration, and the fee would remain in abeyance until the induction of a parson capable of holding the fee, and of transmitting it to his successors as a sole corporation. *Ib.*

12. A private corporation created by the legislature, may lose its franchises by a *misuser* or *nonuser* of them; and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. *Terrett et al. v. Taylor et al.* 9 *Cranck*, 43. 51.

13. Upon a change of government, such exclusive privileges attached to a private corporation, as are inconsistent with the new government, may be abolished. But the charter is not annulled by a revolution. *Terret et al. v. Taylor et al.* 9 *Cranch*, 43. 51. *Dartmouth College v. Woodward*, 4 *Wheat.* 513. 651. 706.

14. In respect, also, to *public corporations* which exist only for public purposes, such as counties, towns, cities, &c. the legislature may, under proper limitations, have a right to change, modify, enlarge, or restrain them, securing, however, the property for the use of those for whom, and at whose expense it was originally purchased. *Terrett et al. v. Taylor et al.* 9 *Cranch*, 51. *Dartmouth College v. Woodward*, 4 *Wheat.* 518. 629. 663.

15. But the legislature cannot repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and cannot by such repeal vest the property of such corporations exclusively in the State, or dispose of the same to such purposes as they may please, without the consent or default of the corporators. *Id.* 675.

16. A corporation is a franchise; and this franchise is an incorporeal hereditament, issuing out of something real or personal, or concerning or annexed to, and exercisable within a thing corporate. *Dartmouth College v. Woodward*, 4 *Wheat.* 518. 657.

17. To this grant or franchise, the parties are the government, and the persons for whose benefit it is created, or trustees for them. The assent of both is necessary. *Ib.*

18. The grant of a corporation implies, on the part of the grantor, a contract not to bestow the same identical franchise on another corporate body. *Id.* 658.

19. There is also an implied contract, that the founder of a private charity, or his heirs, or other persons appointed by him for that purpose, shall have the right to visit and govern the corporation; and in case of its dissolution, a reversionary right to the property with which he had endowed it. *Ib.*

• 20. The rights acquired by the grantees of a corporation, are those of having perpetual succession, of suing and being sued, of purchasing lands for the benefit of themselves and their successors, and of having a common seal, and of making by-laws. *Dartmouth College v. Woodward*, 4 Wheat. 667.

21. There are two kinds of corporations aggregate, viz. such as are for public government, and such as are for private charity. *Id. 659. 668.*

22. Public corporations are for the government of a town, city, or the like, and have no particular founders or visitors. *Id. 680. 688.*

23. But private corporations for charity, founded and endowed by private persons, are subject to the government of those who erect them, and to be visited by them or their heirs, or such other persons as they may appoint. *Id. 674.*

24. A college and a hospital are both private eleemosynary corporations. *Id. 689.*

25. A private corporation is subject to the control of its legal visitor, who, unless restrained by the terms of the charter, may amend and repeal its statutes, remove its officers, correct abuses, and generally superintend the management of the trusts. *Id. 676.*

26. Where the visitatorial power is vested in the trustees of the charity, in virtue of their incorporation, they cannot be removed from their corporate capacity; but they are subject, as managers of the revenues of the corporation, to the general superintending power of the Court of Chancery, not as of itself possessing a visitatorial power, or a right to control the charity, but as possessing a general jurisdiction in all cases of an abuse of trusts to redress grievances, and suppress frauds. *Ib.*

27. And where a corporation is a mere trustee of a charity, a Court of Equity will, in a case of gross fraud, or abuse of trust, take away the trust from the corporation, and vest it in other hands. *Ib.*

28. In the year 1790, S. H., a citizen of Virginia, made his last will, containing the following bequest: "Item, what shall

remain of my military certificates at the time of my decease, both principal and interest, I give and bequeath to the *Baptist Association* that for ordinary meets at Philadelphia annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family." In 1792, the legislature of Virginia passed an act repealing all English statutes, including the statute 43 Eliz. c. 4. In 1795, the testator died. The *Baptist Association* in question had existed as a regularly organized body for many years before the date of his will; and in 1797 was incorporated by the legislature of Pennsylvania, by the name of "The Trustees of the Philadelphia *Baptist Association*." *Held*, 1st. That the Association, not being incorporated at the time of the testator's decease, could not take this trust as a *society*. 2dly. That the bequest could not be taken by the individuals who composed the Association at the death of the testator. 3dly. That there were no persons to whom this legacy, were it not a charity, could be decreed; and, 4thly, That it could not be sustained, in this Court, as a charity. *Baptist Association v. Hart's executors*, 4 Wheat. 1. 26.

29. Charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot be established by a Court of Equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the king as *parens patriæ*, independent of the statute 43 of Eliz. *Ib.*

30. Is, in England, the prerogative of the king, as *parens patriæ*, would, independent of the statute of Eliz. extend to charitable bequests of this description, *Quære*, How far this principle would govern in the Courts of the United States? *Ib.*

31. Supposing this peculiar jurisdiction of the Lord Chancellor to be vested in the Courts of the United States, under the general grant of equity powers in the constitution, it can only be exercised where the Attorney General is a party, *Ib.*

## CORPORATION II.

*Contracts by corporations.*

32. A corporate body can only act in the manner prescribed in the act of incorporation which gives it existence. It is an artificial person, created by law, and derives all its powers from the act of incorporation. *Head v. Providence Ins. Co.* 2 *Cranch*, 127. 167.

33. Thus, where an act incorporating an insurance company, provided, "that all policies of assurance and other instruments, made and signed by the president of the said company, or any other officer thereof, according to the ordinances, by-laws, and regulations of the said company, or of their board of directors, shall be good and effectual in law, to bind and oblige the said company to the performance thereof, in manner as set forth in the constitution of the said company, hereinafter recited and ratified :" Held, that it was not necessary that the contracts of the company should be under the corporate seal ; but that a contract varying a policy, in order to become the act of the company, must be executed in the same manner with the policy itself; i. e. in writing, signed by the president, &c. *Ib.*

34. The force of a policy executed by such a company according to its act of incorporation and by-laws, may indeed be terminated by actually cancelling it, but an agreement to cancel it must be executed in the same manner with the policy itself. *Ib.*

35. Anciently it seems to have been held that corporations could not do any act without deed. *Bank of Columbia v. Patterson's administrator*, 7 *Cranch*, 299. 305.

36. Afterwards the rule was relaxed, and corporations were, for convenience's sake, permitted to act in ordinary matters without deed ; as to retain a servant, &c. and this relaxation was gradually widened to embrace other objects. *Ib.*

37. At length it was established that though they could not

contract directly, except under their corporate seal, yet they might by mere vote or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts within the scope of his authority, would be binding on the corporation. *Bank of Columbia v. Patterson's administrator*, 7 Cranch, 299.

305.

38. And Courts of Equity, in this respect following the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal. *Ib.*

39. Where a committee of a corporation are fully authorized to make agreements, a contract made by them in the name of the corporation, and not in their own names, is binding on the corporation. *Ib.*

40. Wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie. *Ib.*

41. Where a contract is for the exclusive use and benefit of a corporation, and made by their agents, under their private seals, for purposes authorized by the charter of the corporation, and the corporation proceed, on the faith of the contract, to pay money to the other contracting party, although an action may lay against the agents personally, upon their express contract, yet as the whole benefit results to the corporation, a jury may infer from this evidence that the corporation had adopted the contract of their agents. *Ib.*

42. An incorporated bank or insurance company, although it has no express power to make a promise not under seal, is yet liable for the notes issued by it, for the funds deposited in it, for the repayment of a premium the consideration of which has failed, or for any other express or implied assumpsit in the ordinary course of its business, in the same manner as a natural person. *Ib.*

*Ex vide AGREEMENT II. (B)*

COURTS OF THE UNITED STATES III. 49.

EVIDENCE VI. 91. VIII. 109.

LOCAL LAW IV.

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## COURTS OF THE UNITED STATES.

- I. *Courts of the United States in general.*
- II. *The Supreme Court.*
- III. *Circuit Courts.*
- IV. *District Courts.*

## COURTS OF THE UNITED STATES I.

### *Courts of the United States in general.*

1. The Courts of the United States may, in cases of salvage, decree salvage as between aliens, at least where the jurisdiction is not objected to. *Mason v. The Blaireau & Cranch*, 240.

2. In order to maintain a suit in the Courts of the United States, the jurisdiction should appear on the record. As if the suit be between citizens of different States, the citizenship of the respective parties should be set forth. *Bingham v. Cabot*, 3 Dall. 382. *Turner v. Bank of North America*, 4 Dall. 8. *Mosman v. Higginson*, 4 Dall. 12. *Abercrombie v. Dupuis*, 1 Cranch, 343. *Wood v. Wagnon*, 2 Cranch, 1.

3. So, it must be shown that the party is an alien, if jurisdiction rests on this fact. *Turner v. Bank of North America*, 4 Dall. 8. *Turner's administrator v. Enrille*, 4 Dall. 7.

4. So, if the suit be founded on a promissory note, by an assignee, under the 11th sec. of the judiciary act of 1789, c. 20. it is necessary to show that the original parties to the note might

have sued and been sued in the Courts of the United States. *Turner's administrator v. Bank of North America*, 4 Dall. 8.

5. It is a general rule, that the province of an appellate Court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment, and before the decision of the appellate Court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation be denied. *United States v. The Schooner Peggy*, 1 Cranch, 103.

6. The Courts of the United States will not sustain a suit to enforce an agreement entered into in fraud of a law of the United States, although made by persons then enemies of the United States, and having for its object a mere stratagem of war. *Hannay v. Eve*, 3 Cranch, 242.

7. Courts which originate in the common law, possess a jurisdiction which must be regulated by that law, until some statute changes it; but Courts established by written law, and whose jurisdiction is defined by written law, cannot lawfully transcend that jurisdiction. *Ex parte Bollman*, 4 Cranch, 75.

8. The Courts of the United States have no common law jurisdiction of crimes against the United States. But, independent of statutes, these Courts have power to fine for contempt, and imprison for contumacy, and to enforce obedience to orders, &c. *United States v. Hudson & Goodwin*, 7 Cranch, 32.

9. *Sed quære*, As to the authority of the above case, in respect to the general criminal jurisdiction of the Courts of the United States at common law? *United States v. Coolidge*, 1 Wheat. 415.

10. The legislature of a State cannot annul the judgments, nor determine the jurisdiction of the Courts of the United States. *United States v. Peters*, 5 Cranch, 115.

11. Although the claims of a State may be ultimately affected by the decision of a cause, yet if the State be not necessarily a party defendant, the Courts of the United States are bound to exercise jurisdiction. *Ib.*

12. The Courts of the United States are all of limited juris-

diction, and their proceedings are erroneous if the jurisdiction be not shown upon them; and for this cause their judgments may be reversed: but they are not nullities. *Kempe's lessee v. Kennedy*, 5 *Cranch*, 173.

13. A writ of error lies on a statement of facts in the nature of a special verdict, *Slacum v. Simmons and wife*, 5 *Cranch*, 363.

14. The Courts of the United States, on the common law side of those Courts, have no jurisdiction to entertain causes which respect the conduct of the officers of the United States in making seizures, except upon a writ of error under the 25th section of the judiciary act of 1789, c. 20. *Slocum v. Mayberry*, 2 *Wheat*. 1.

15. But, as Courts of Admiralty, they may sustain libels for damages for illegal seizures, and compel the seizing officer to institute proceedings to ascertain the asserted forfeiture. *Ib.*

16. The Courts of the United States have exclusive jurisdiction of all seizures made on land and water, for breach of the laws of the United States, and any intervention of a State authority, which, by taking the thing seized out of the hands of the officer of the United States, might obstruct the exercise of jurisdiction, is unlawful. *Ib.*

17. The Courts of the United States have jurisdiction, being neutral, to restore to one belligerent his property captured by another belligerent, whose force has been increased, in violation of our laws, within our ports. *The Alerta*, 9 *Cranch*, 359. *The Divina Pastora*, 4 *Wheat*. 52. 63. *The Estrella*, *ib.* 298. 306. *La Amistad de Rues*, 5 *Wheat*. 385. 389.

18. The remedies in the Courts of the United States, are to be at common law, or in equity, not according to the practice of the State Courts, but according to the principles of common law and equity, as distinguished and defined in that country (England) from which we derive our jurisprudence. Therefore, a title, which upon general principles is merely equitable, will not support an ejectment, unless the statutes of the State have changed it into a legal title. *Robinson v. Campbell*, 3 *Wheat*. 212.

## COURTS OF THE UNITED STATES II.

*The Supreme Court.*

19. The Supreme Court has jurisdiction, under the constitution and laws of the United States, to bail a person committed for trial on a criminal charge by a District Judge. *United States v. Hamilton, 3 Dall. 17.*

20. It is very questionable, whether the Supreme Court, under the act of 1789, c. 20, s. 5. or the act of 1793, c. 167. [xxii.] s. 3. can appoint a special Circuit Court at a distant period, to overleap the session of the stated Court. *Ib.*

21. A case which belongs to the jurisdiction of the Supreme Court, on account of the interest which a State has in the controversy, must be a case in which the State is either nominally or substantially the party. *Fowler v. Lindsay, 3 Dall. 411.* *State of New-York v. State of Connecticut, 4 Dall. 3.*

22. To sustain the appellate jurisdiction of the Supreme Court, under the judiciary act of 1789, c. 20. s. 22. the value in controversy in the suit must exceed 2,000 dollars: where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded. *Wilson v. Daniel, 3 Dall. 401.*

23. Where a suit was brought on a bond, with a penalty, for £60,000, and a verdict was found for the plaintiff, and damages assessed by the jury for 1,800 dollars only, and costs; and judgment was given for the whole penalty, to be discharged by the payment of 1,800 dollars, and costs; it was held, that the Supreme Court had jurisdiction upon a writ of error brought by the defendant: but there was a great diversity of opinion on the bench, the majority of the Court only agreeing in that particular case, that the verdict or judgment was not to be regarded as the rule for ascertaining the value of the matter in dispute between the parties; three of the judges concurring that the

judgment in that case was to be considered as a judgment at the common law for the whole penalty. *Wilson v. Daniel*, 3 *Dall.* 401. But see *United States v. McDowell*, 4 *Cranch*, 316.

24. The Supreme Court will not take cognizance of any suit not regularly brought before it by process of law. *Dewhurst v. Coulthard*, 3 *Dall.* 409.

25. The Supreme Court may, in an Admiralty cause, on a writ of error, under the judiciary act of 1789, c. 20. s. 22. affirm the decree of the Court below in part, and reverse it in part, and is not bound by the common law doctrine as to reversals; and it may award the costs of the Courts below, to be paid or not in its discretion, and order the parties to pay their own costs in the Supreme Court. *Penhallo v. Doane*, 3 *Dall.* 54.

26. Where a writ of error is brought from the judgment of a State Court of Appeals, to revise its decision reversing the judgment of an inferior State Court, and the Supreme Court of the United States reverse the decision of the Court of Appeals, the judgment of the latter becomes a nullity, and the Supreme Court will direct its mandate to the inferior State Court. *Clarke v. Harwood*, 3 *Dall.* 342.

27. The Supreme Court will not take cognizance of any cause not regularly brought before it. *Dewhurst v. Coulthard*, 3 *Dall.* 409.

28. No writ of error lies from the General Court of the Northwestern Territory of the United States to the Supreme Court, under any act of Congress. *Clarke v. Baradone*, 1 *Cranch*, 212.

29. Under the 25th sec. of the judiciary act of 1789, c. 20. no writ of error lies from the judgment of a State Court, if the decision be in favour of the privilege set up under an act of Congress. *Gordon v. Caldclough*, 3 *Cranch*, 268.

30. The Supreme Court has power to grant the writ of *habeas corpus ad subjiciendum*. *Ex parte Bollman*, 4 *Cranch*, 75.

31. An appeal lay to the Supreme Court from the decree of the District Court of the Territory of Orleans, in a suit in equity by the act of 26th of March, 1804, c. 391. [xxxviii.] *Morgan v. Callender*, 4 *Cranch*, 370.

32. If two citizens of the same State, in a suit in a State Court, claim title under the same act of Congress, the Supreme Court has appellate jurisdiction to revise the same under the 25th sec. of the judiciary act of 1789, c. 20: *Matthews v. Zane*, 4 *Cranch*, 382.

33. No writ of error lies to the Supreme Court directly from the decisions of the District Court of Maine, notwithstanding it exercises the powers of a Circuit Court; but by the 10th sec. of the judiciary act of 1789, c. 20. writs of error lie from that Court to the Circuit Court of Massachusetts: *United States v. Weeks*, 5 *Cranch*, 1.

34. An appeal lies to the Supreme Court from an order of the Circuit Court of the District of Columbia, quashing an inquisition in the nature of an *ad quod damnum*. *Custis v. Georgetown and Alexandria Turnpike Company*, 6 *Cranch*, 233.

35. The appellate powers of the Supreme Court are given by the constitution; but are limited and regulated by the acts of Congress. *Durousseau v. United States*, 6 *Cranch*, 307.

36. The Supreme Court has appellate jurisdiction from the decisions of the District Courts of Kentucky, Ohio, Tennessee, and Orleans, even in causes properly cognizable by the District Courts of the United States. *Ib.*

37. The Supreme Court has no jurisdiction to issue a mandamus to a register of a land office, requiring him to enter the application in his office, in a case where a mandamus has been refused by the highest State Courts. *M'Clung v. Silliman*, 2 *Wheat.* 369.

38. It is a mistake to suppose that instructions couched in general terms, as that the matters proved were not sufficient to bar the plaintiff, &c. in a State Court, will defeat the exercise of the appellate jurisdiction of the Supreme Court, under the 25th sec. of the judiciary act of 1789, c. 20. It will only oblige the appellate Court to look through the whole cause, and examine if there be nothing which ought to have called forth a different instruction or judgment. *Otis v. Walker*; 2 *Wheat.* 18.

39. The Supreme Court has no jurisdiction under the 25th

sec. of the judiciary act of the 24th of September, 1789, c. 20. unless the judgment or decree of the State Court be a *final judgment* or decree. A judgment reversing that of an inferior Court, and awarding a *venire facias de novo*, is not a *final judgment*. *Houston v. Moore*, 3 Wheat. 433.

40. The Supreme Court has no jurisdiction in causes brought before it upon a certificate of division of opinion of the judges of the Circuit Court of the District of Columbia, under the judiciary act of 1802. c. 291. [xxxi.] s. 6. - *Ross v. Triplett*, 3 Wheat. 600.

41. If it appears upon the record that the Court has no jurisdiction of the cause; as that it is a prize, cause, and the suit is at common law, the Supreme Court will not, on reversal of the judgment, award a *venire facias de novo*. *Bingham v. Cabot*, 3 Dall. 19.

### COURTS OF THE UNITED STATES III.

#### *Circuit Courts.*

42. Under the act of 1789, c. 20. s. 5. and the act of 1793, c. 167. [xxii.] s. 3. authorizing special Circuit Courts to be holden for the trial of criminal causes, there is no power given to remit to a special Court the business depending for trial before the stated Circuit Court. *United States v. Hamilton*, 3 Dall. 17.

43. *Quære*: If a special and stated Circuit Court can be both in session at the same time, within the same district; or two grand juries be impanelled at the same time for the same district, and both be qualified to present offences committed within their jurisdiction? *Ib.*

44. The Circuit Court of the United States, though an inferior Court in the language of the constitution, is not so in the language of the common law; nor are its proceedings subject to the scrutiny of those narrow rules which the English Courts long applied to Courts of that denomination, but are entitled to as liberal intendments or presumptions in favour of their regularity, as those of the Supreme Court. A Circuit Court is, however, a Court of a *limited jurisdiction*, and the fair presumption is, (unlike the case of Courts of general jurisdiction,) that a case is

without its jurisdiction until the contrary appears. *Turner's administrator v. Bank of North America*, 4 Dall. 8.

45. A citizen of the District of Columbia, is not a citizen of a State in the sense of the constitution, and entitled to sue as such in the Courts of the United States. *Hepburn, &c. v. Ellzey*, 2 Cranch, 448.

46. When both parties are aliens in a civil suit at common law or in equity, the Courts of the United States have no jurisdiction. *Montalet v. Murray*, 4 Cranch, 46.

47. The Courts of the United States have jurisdiction in a case between citizens of the same State, if the plaintiffs are only nominal parties, suing officially for the use of an alien. *Browne v. Strode*, 5 Cranch, 303.

48. The Courts of the United States have jurisdiction of causes where the plaintiffs are aliens, although they sue not in their own right, but as trustees. As if they sue as legatees and administrators of a deceased person. *Chappedelaine and another v. Dechenaux*, 4 Cranch, 306.

49. An aggregate corporation is not a citizen within the meaning of the constitution of the United States, and cannot litigate in the Courts of the United States, unless in consequence of the citizenship of the individuals who compose it, which character must be averred on the record. *Hope Insurance Company v. Boardman*, 5 Cranch, 57. *Bank of United States v. Deveaux*, 5 Cranch, 61.

50. A corporation composed of citizens of one State, may sue a citizen of another State in the Circuit Court of the United States. *United States v. Deveaux*, 5 Cranch, 61.

51. A general assignee of the effects of an insolvent debtor, cannot sue in the Federal Courts under the 11th. section of the Judiciary Act of 1789, c. 20. if his assignor could not have sued in those Courts. *Scre v. Pitot*, 6 Cranch, 332.

52. The power of the Circuit Courts of the United States to issue a writ of *mandamus*, is confined exclusively to cases in which it may be necessary to exercise jurisdiction in cases vested in them. *M'Intire v. Wood*, 7 Cranch, 504.

53. The Circuit Courts of the United States have jurisdiction

in writs of right, where the property demanded exceeds 500 dollars in value; and if upon trial the demandant recovers less, he is not to be allowed his costs, and in the discretion of the Court may be adjudged to pay costs. *Liter v. Green*, 8 Cranch, 229.

54. Under the clause of the constitution, declaring that the judicial power shall extend to controversies between citizens of the same State claiming lands under grants of different States, a case is included where one party claimed land under a grant from the State of New-Hampshire, and the other under a grant from the State of Vermont; although at the time of the first grant Vermont was part of New-Hampshire. *Town of Pawlet v. Clarke*, 9 Cranch, 292.

55. A citizen of a territory of the United States cannot sue a citizen of a State in the Courts of the United States, nor can those Courts take jurisdiction by other parties being joined who are capable of suing in those Courts; for the jurisdiction cannot be sustained unless each individual be entitled to claim that jurisdiction. *Corporation of New-Orleans v. Winter*, 1 Wheat. 91.

56. The Circuit Courts of the United States have jurisdiction in a case between citizens of Kentucky claiming lands under different grants, one issued by Kentucky, the other by Virginia, but upon warrants issued by Virginia, and locations founded thereon prior to the separation of Kentucky from Virginia. The constitution and laws on this subject look to the grants as the foundation of jurisdiction, and not to any equitable title previous to the grants. *Colson v. Lewis*, 2 Wheat. 377.

57. The jurisdiction of the Circuit Court, in a suit between citizens of different States, having once vested, cannot be devested by a subsequent change of domicil of either of the parties, *pendente lite*. *Morgan's heirs v. Morgan*, 2 Wheat. 290.

58. A Circuit Court of the United States has not jurisdiction to enjoin proceedings in a State Court. *Diggs v. Wolcott*, 4 Cranch, 179.

59. The Circuit Court has jurisdiction to sustain a suit in equity for an injunction and relief upon a judgment obtained in that Court between the same parties, although the subpoena be

not served within the District. *Logan v. Patrick*, 5 Cranch, 288.

60. The Circuit Courts of the United States have jurisdiction to sustain a bill in equity in the case of a general assignment, where the United States sue to enforce their priority under the act of 1799, c. 128. [cxxxviii.] s. 65. against the debtor of their debtor, notwithstanding a Court of law may enforce the same right in a suit at law under the local laws of the State; for the case is a fit case for Chancery jurisdiction, and as the Courts of the Union have a Chancery jurisdiction in every State, and the judiciary act confers the same powers on all, and gives the same rule of decision, the jurisdiction in one State must be the same as in the other States. *United States v. Howland*, 4 Wheat. 158.

61. The District Judge cannot sit in the Circuit Court in a cause brought by writ of error from the District Court to the Circuit Court, and the cause cannot be certified from the Circuit Court to the Supreme Court, under such circumstances as on a division of opinion in the Circuit Court, under the act of 29th of April, 1802, c. 291. [xxxii.] s. 6. *United States v. Lancaster*, 5 Wheat. 435.

62. A State Court has no jurisdiction to grant an injunction of a judgment of the Circuit Court of the United States. *M'Kim v. Voorhies*, 7 Cranch, 279.

63. Under the judiciary act of 1789, c. 20. s. 11. giving jurisdiction to the Circuit Court where an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State, if the suit be joint, each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the Federal Courts. That is, where the interest is joint, each of the persons concerned in the interest must be competent to sue or be sued in those Courts. *Strawbridge v. Curtiss*, 3 Cranch, 287. *Corporation of New-Orleans v. Winter*, 1 Wheat. 91.

64. Quære, How it would be, where several parties represent several distinct interests, and some of the parties are, and others

are not competent to sue or be sued in the Federal Courts. *Strawbridge v. Curtis*, 3 *Cranch*, 267. *Corporation of New-Orleans v. Winter*, 1 *Wheat.* 91.

## COURTS OF THE UNITED STATES IV.

## District Courts.

65. The District Court, under the judiciary act of 1789, c. 20, possesses all the powers of a Court of Admiralty, whether considered as an Instance or Prize Court. *Glass v. The Betsey*, 3 *Dall.* 6. *Jennings v. Carson*, 4 *Cranch*, 2. *The Amiable Nancy*, 3 *Wheat.* 546.

66. It has, therefore, jurisdiction to inquire and decide whether, in the case of a vessel captured and brought into our ports, restitution can be made consistently with the law of nations, and the treaties and laws of the United States. *Glass v. The Betsey*, 3 *Dall.* 6.

67. It is no plea to the jurisdiction of the Court, that the vessel is captured as prize: but if, in fact, the capture has been made by a belligerent without any violation of our neutrality, that is a bar to the further proceedings of the District Court. *Glass v. The Betsey*, 3 *Dall.* 6. *United States v. Peters*, 3 *Dall.* 121. *Talbot v. Jansen*, 3 *Dall.* 133.

68. The District Court, as a Court of admiralty jurisdiction, has authority to sustain a libel to enforce a decree of the Federal Court of Appeals. *Penhallow v. Doane*, 3 *Dall.* 54. *Jennings v. Carson*, 4 *Cranch*, 2.

69. It seems, that in such suit, the District Court cannot inquire into the grounds of the original decree, but is bound by it. *Penhallow v. Doane*, 3 *Dall.* 54.

70. The District Court, as a Court of Admiralty, has jurisdiction upon the subject of salvage, and consequently a power of determining to whom the residue of the property ought to be delivered. *M'Donough & Danner v. The Mary Ford*, 3 *Dall.* 188.

71. Where the District Judge does not judicially sit in a cause in the Circuit Court, he is considered as absent in contemplation of law, within the meaning of the act of 1793, c. 167. [xxii.] s. 1. though he be on the bench. *Bingham v. Cabot*, 3 *Dall.* 19.

72. Where the District Judge acts in a judicial capacity, as in deciding upon the propriety of issuing a warrant, the Supreme Court will not grant a mandamus to compel him to decide according to the dictates of any judgment but his own. *United States v. Lawrence*; 3 *Dall.* 42.

73. The District Courts of the United States are Courts of Admiralty, and as no law has regulated their practice, they proceed according to the general rules of the Admiralty. *Jennings v. Carson*, 4 *Cranch*, 2.

74. The citizens of the Territory of Orleans may sue and be sued in the District Court of that Territory, in the same cases in which a citizen of Kentucky may sue and be sued in the Court of Kentucky, by act of Congress. *Sere v. Pitot*, 6 *Cranch*, 332.

*Et vide ADMIRALTY I. IV.*

CHANCERY.

PRACTICE.

PRIZE I. X.

## DEED.

- I. *Description of the land granted.*
- II. *Alterations in a deed.*
- III. *Construction and effect of covenants.*
- IV. *Covenants by trustees, agents, executors, &c.*
- V. *Registry of deeds.*
- VI. *Marshal's deed.*
- VII. *Other matters.*

## DEED I.

*Description of the land granted.*

1. A grant of an island *by name*, in a particular river, superadding the courses and distances of the boundary lines thereof, which on a resurvey are found to exclude part of the island, will pass the whole island. *Lodge's lessee v. Lee*, 6 Cranch, 237.
2. Thus, where a party claimed under a patent from the Lord Proprietor of Maryland, dated in 1723, granting to T. L. "all that tract or upper island of land, called *Eden*, lying and being in Prince George county, beginning at a bounded maple, near ten miles above the second falls, and opposite to a large run on the Virginia side called Hickory run, and standing upon a point at the foot of the said island, and running thence," &c. (giving the course and distance of every line to the beginning tree,) "containing and laid out for 320 acres of land, more or less:" held, that the grant passed the whole of the island called *Eden*, although upon a resurvey the courses and distances of the lines were found to exclude part of it. *Ib.*

3. A plat referred to in a deed as being annexed to it, but which was never in fact annexed, and was not recorded with the deed, affords no evidence in aid of the description of the pro-

property mentioned in the deed. *Shirras et al. v. Caig & Mitchel*, 7 Cranch, 34. 48.

4. Thus, where the property conveyed was described as—"All that lot of land, houses, and wharfs in the city of Savannah, as is particularly described by the annexed plat, and is generally known by the name of *Gairdner's wharf*." The plat was not annexed, nor recorded with the deed. It was, however, proved as an exhibit in the cause, and appeared to be a plat of part of the town of Savannah, including the lot on which Gairdner's wharf was, and also one other lot belonging to the same grantors, which was designated as No. 6. and which did not adjoin the property on which the wharves were erected. *Held*, that the words in the deed descriptive of the property intended to be conveyed were applicable to the wharf lot only. *Ib.*

## DEED II.

*Alterations in a deed.*

5. An addition to, or alteration in a deed, as by adding a new obligor, or an erasure in a deed, as by striking out an old obligor, if done with the assent and concurrence of all the parties to the deed, does not avoid it. *Speake et al. v. United States*, 9 Cranch, 28. 37.

## DEED III.

*Construction and effect of covenants.*

6. Where the parties to a deed covenanted severally against their own acts and incumbrances, and also to warrant and defend against their own acts, and those of all other persons, with an indemnity in lands of an equivalent value in case of eviction; it was held, that these covenants were independent, and that it was unnecessary to allege in the declaration any eviction, or any demand or refusal to indemnify with other lands, but that it was

sufficient to allege a prior incumbrance by the acts of the grantors, &c. and that the action might be maintained on the first covenant in order to recover pecuniary damages. *Duvall v. Craig*, 2 Wheat. 45. 58.

7. Where the grantors covenant generally against incumbrances made by them, it may be construed as extending to several, as well as joint incumbrances. *Ib.*

8. An averment of an eviction under an elder title is not always necessary to sustain an action on a covenant against incumbrances; if the grantee be unable to obtain possession in consequence of an existing possession or seisin by a person claiming and holding under an elder title, it is equivalent to an eviction, and is a breach of the covenant. *Ib.*

9. *Quære*, Whether in an action upon a covenant against incumbrances, the plaintiff is bound to show that the adverse claimant recovered, in the suit by which the plaintiff is evicted, by title paramount, or whether the recovery is *prima facie* evidence of that fact? *Somerville v. Hamilton*, 4 Wheat. 230.

#### DEED IV.

##### *Covenants by trustees, agents, executors, &c.*

10. A trustee, merely as such, is, in general, only suable in equity. But if he chooses to bind himself by a personal covenant, he is liable at law for a breach thereof, in the same manner as any other person, although he describe himself as covenanting as trustee; for, in such case, the covenant binds him personally, and the addition of the words, "as trustee," is but matter of description to show the character in which he acts for his own protection, and in no degree affects the rights or remedies of the other party. *Duvall v. Craig*, 2 Wheat. 45. 58.

11. An agent or executor who covenants in his own name, and yet describes himself as agent or executor, is personally liable, because the one has no principal to bind; and the other substitutes himself for his principal. *Ib.*

## DEED V.

*Registry of deeds.*

32. Although the grantees in a deed executed *after*, but recorded *before*, another conveyance of the same land, being *bona fide* purchasers without notice, are by law deemed to possess the better title; yet where L. conveyed to C. the land in controversy *specifically*, describing himself as devisee of A. S., by whom the land was owned in his life-time, and by a subsequent deed (which was first recorded) L. conveyed to B. "all the right, title, and claim, which he, the said A. S., had, and all the right, title, and interest, which the said L. holds as legatee and representative to the said A. S. deceased, of all land lying and being within the State of Kentucky, which cannot at this time be particularly described, whether by deed, patent, mortgage, survey, location, contract, or otherwise," with a covenant of warranty against all persons claiming under L., his heirs and assigns; it was held, that the latter conveyance operated *only upon lands, the right, title, and interest of which was then in L. and which he derived from A. S.*, and, consequently, could not defeat the operation of the first deed upon the land specifically conveyed. *Brown v. Jackson*, 3 Wheat. 449.

## DEED VI.

*Marshal's deed.*

13. The party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under it is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which the validity of the deed might depend. *Williams v. Peyton*, 4 Wheat. 77. 79.

14. In the case of lands sold for the non-payment of taxes,

the Marshal's deed is not even *prima facie* evidence, that the prerequisites required by law have been complied with; but the party claiming under it must show positively that they have been complied with. - *Williams v. Peyton*, 4 Wheat. 77. 79.

## DEED VII.

## Other matters.

15. A patent issued to J. C. on the 18th of November, 1784, for 1,000 acres of land in Kentucky, included in three separate warrants of 320, 480, and 200 acres, surveyed for J. C. on the 14th of January, 1783. On the 16th of July, 1784, J. C. conveyed by deed the same 1,000 acres to M. G. the ancestor of the lessor of the plaintiff, and covenanted to cause a patent to issue to M. G., or if it could not issue in his name, that he, J. C., would stand seized to the use of M. G. and make other conveyances. On the 23d of June, 1786, M. G. made an agreement with R. B., the defendant in ejectment, to convey to him 750 acres, part of the tract of 1,000 acres, under which agreement R. B. entered into possession of the whole tract: and on the 11th of April, 1787, J. C., by direction of M. G., conveyed to R. B. the 750 acres in fulfilment of said agreement, which were severed by metes and bounds from the tract of 1,000 acres. J. C. and his wife, on the 26th of April, 1791, made a conveyance in trust of all his property, real and personal, to R. T. and P. C. On the 12th of February, 1813, R. J., as surviving trustee, conveyed to M. G., under a decree in equity, that part of the 1,000 acres not previously conveyed to R. B., and in the part so conveyed, under the decree, was included the land claimed in the ejectment. R. B. (the defendant) claimed the land in controversy under a patent for 400 acres, issued on the 15th of September, 1795, founded on a survey made for B. N. May 12th, 1782: and under a deed of the 13th of December, 1796, from one Coburn, who had, in the winter and spring of 1791, entered into and fenced a field within the bounds of the original patent

for 1,000 acres to J. G., claiming to hold the same under B. N.'s survey of 400 acres. *Held*, 1st. That where a patent issues of vacant land, the patentee acquires, upon the issuing of the patent, a constructive actual seisin of the land included in his patent. 2dly. Where two persons are in possession of land at the same time, under different titles, the law adjudges him to have the seisin of the estate who has the better title. Both cannot be seized, and, therefore, the seisin follows the better title. 3dly. In cases where portions of the same land are claimed under different titles, and each of the parties claims seisin and possession of the whole, to the extent of his title, in virtue of an actual seisin of a part, the law adjudges the seisin of the unoccupied part to the party having the better title, and the disseisin of the other party under the inferior title, does not extend beyond the limits of his actual occupancy, and his case is the same as if he had made an entry on the land without title. 4thly. The deed of the 16th of July, 1784, from J. C. to M. G., being more than thirty years old, and proved to have been in possession of the lessors of the plaintiffs, and actually asserted as the ground of their title in the equity suit, was admissible in evidence without regular proof of its execution. *Barr v. Gratz*, 4 Wheat. 213.

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## DESCENT.

1. Contingent remainders and executory devises are transmissible to the heirs of the party to whom they are limited, if he chance to die before the contingency happens. *Barnett's lessee v. Casey*, 7 Cranch, 456. 469.

2. In such case, however, the executory devise does not vest absolutely in the first heir; so as, upon his death, to carry it to his heir at law, who is not heir at law of the first devisee, but it devolves from heir to heir, and vests absolutely in him only who

can make himself heir to the first devisee at the time when the contingency happens, and the executory devise falls into possession. *Barnitz's lessee v. Casey*, 7 Cranch, 456: 469.

3. This rule is adopted in analogy to that rule of descent, which requires, that a person who claims a fee simple by descent from one who was first purchaser of the reversion, or remainder expectant, on a freehold estate, should make himself heir of such purchaser at the time when that reversion or remainder falls into possession. *Ib.*

4. Nor does it vary the legal result; that the person to whom the preceding estate is devised, happens to be the heir of the executory devisee; for though on the death of the latter, the executory devise devolves upon him, yet it is not merged in the preceding estate, but expects the regular happening of the contingency, and then vests absolutely in the then heir of the executory devisee. *Ib.*

*Et vide LOCAL LAW III. 52.*

XI. (B) 239.

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## DEVISE.

1. A devise of "all the estate called Marrowbone, in the county of Henry, containing by estimation 2,585 acres of land; likewise one other tract of land in said county, called Horse-pasture, containing by estimation 2,500 acres; also one other tract in the county aforesaid, containing by estimation 667½ acres of land, called the Poison-field. It is my desire, that all my negroes, horses, and other property, be sold," &c. held to carry a fee in the Marrowbone tract. *Lambert's lessee v. Paine*, 3 Cranch, 97.

2. The rule of law is, that where, in a devise of real property, there are no words of limitation superadded to the general words

of bequest, nothing passes but an estate for life. *Lambert's lessee v. Paine*, 3 Cranch, 130. *Per Washington, J.*

3. But since in most cases this rule goes to defeat the probable intention of the testator, who, in general, is unacquainted with technical phrases, and is presumed to mean a disposition of his whole interest, unless he uses words of limitation, Courts, to effectuate this intention, will lay hold of general expressions in the will, which from their legal import, comprehend the whole interest of the testator in the thing devised. *Ib.*

4. But if other words be used, restraining the meaning of the general expressions, so as to render it doubtful whether the testator intended to pass his whole interest or not, the rule of law which favours the right of the heir must prevail. *Ib.*

5. Thus, it has been determined that the words "all my estate at, or in, such a place," unless limited and restrained by other words, may be resorted to as evidence of an intention to pass, not only the land itself, but also the interest which the testator had in it. *Ib.*

6. But words which import nothing more than a specification of the thing devised, as "all my lands," "all my farms," and the like, have never been construed to pass more than an estate for life, even when aided by an introductory clause, declaring an intention to dispose of all his estate. *Ib.*

7. The case of *Wilson v. Robinson*, (2 Lev. 91. 1 Mod. 100,) in which these words in a devise, "all my tenant right estate at Brigisend in Underbarrow," were held to pass a fee, is of doubtful authority. No reasons are given by the Court for their opinion, and, consequently it is impossible to know whether it was or was not influenced by other parts of the will. *Ib.*

8. *Ibbetson v. Beckwith*, (Cas. temp. Talbot,) was decided upon a manifest intention of the testator to pass the inheritance, arising out of the different parts of the will taken together, amongst which is to be found an introductory clause, which the Lord Chancellor says, affords evidence that the testator had in view his whole estate. *Ib.*

9. It is a fundamental maxim, upon which the construction of

every will must depend, that the intention of the testator, as disclosed by the will, shall be fully and punctually carried into effect, if it be not in contradiction to some established rule of law. In that case the intention must yield to the rule. *Lambert's lessee v. Paine*, 3 Cranch, 133. *Per Patterson, J.*

10. When a particular expression in a will has received a definite meaning, by express adjudications, such definite meaning must be adhered to, for the sake of uniformity of decision, and of security in the disposal of landed property. *Ib.*

11. The word "estate" will carry every thing, both the land, and the interest in it, unless it be restrained by particular expressions. *Ib.*

12. But this word, when coupled with things that are personal only, is restrained to the personality. *Noscitur a sociis*. *Ib.*

13. The word "estate" may also, from the particular phraseology, connected with the apparent intent of the testator, assume a local form and habitation, so as to limit its sense to the land itself. *Ib.*

14. A description merely local cannot be extended beyond locality, without departing from the obvious import of the words, and thus making, instead of construing, the will of the testator. But when no words are made use of to manifest the intention of the testator, that the term "estate" should be taken in a limited signification, then it will pass a fee. *Ib.*

15. Such is the legal import and operation of the word "estate," that it carries a fee, even when expressions of locality are annexed, unless it be such a locality as is sufficient to show the testator's intention merely to convey the lands themselves, and not the interest in them. *Ib.*

16. A devise to A. in fee, and if he shall die under the age of 21 years, and without issue, then to B. in fee, is a good executory devise. *Barnitz's lessee v. Casey*, 7 Cranch, 456. 469.

17. An executory devise is not too remote, if the contingency may happen within a life or lives in being, or 21 years and a few months after. *Ib.*

18. It is the rule of the common law, that a will, as to lands,

speaks at the date of it, and as to personal property, at the time of the testator's death. Lands acquired after the date of the will do not pass by it. *Smith et al. v. Edrington*, 8 Cranch, 66. 70.

*Et vide DESCENT.*

LOCAL LAW XI. (B) 236—239.

## DOWER.

1. If it be manifest from the face of the will of a deceased husband, making a provision for his widow, that the testator did not intend the provision it contains for his widow to be in addition to her dower, but to be in lieu of it; if his intention discovered in other parts of the will must be defeated by the allotment of dower to the widow, she must make her election, and either renounce her dower, or the benefit she claims under the will. *Herbert et al. v. Wren et al.* 7 Cranch, 370. 378.

2. But if the two provisions may stand well together, if it may fairly be presumed that the testator intended the devise or bequest to his wife as additional to her dower, then she may hold both. *Ib.*

3. The widow does not lose her election, and is not considered as renouncing her legal dower, unless she accepts the provision of the will, and actually enjoys it. *Ib.*

4. *A fortiori*, she does not renounce her right to dower where she performs acts implying an assertion of her claim to it. *Ib.*

5. *Quære*, Whether, in general, a party claiming dower from a purchaser, can recover profits which accrued previous to the commencement of her suit?

6. However this may be in general, yet where the plaintiff has been in the actual enjoyment of dower, having received one third

of the rents of the premises for a long time after the decease of her husband, and the estate is afterwards sold, she is entitled to receive from the purchaser one third of the profits which may have accrued subsequent to the sale. *Herbert et al. v. Wren et al.* 7 *Cranch*, 370. 378.

7. Where the estate is sold, a Court of Equity cannot allow a sum in gross in lieu of dower, unless by consent of all the parties interested, but must, unless such consent is given, decree one third of the purchase money to be set apart, and the interest thereof paid annually to the person entitled to dower, during her life. *Ib.*

*Et vide Local Law XI. (B) 234.*

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## EJECTMENT.

1. Where a title to land is merely equitable in its own nature, but by the local laws or usages of a State, it is considered as giving a *legal* right of entry, that right having once become an established *legal* right, and having incorporated itself as such with property and tenures, it remains a *legal* right notwithstanding any new distribution of judicial powers, and must be regarded by the common law Courts of the United States in such State as a rule of decision. *Sims v. Irvine*, 3 *Dall.* 425.

2. The general rule is, that remedies in respect to real estate are to be pursued according to the law of the place where the estate is situate. *Robinson v. Campbell*, 3 *Wheat.* 212.

3. The remedies in the Courts of the United States are to be, at common law and in equity, not according to the practice of the State Courts, but according to the principles of common law and equity as defined and distinguished in England, from which we derive our jurisprudence. Therefore an ejectment will not

lie in the Courts of the United States upon a mere *equitable title*, unless by the laws of the State that *equitable title* has been declared to be a *legal title* also. *Robinson v. Campbell*, 3 Wheat. 212.

4. Although an action of ejectment is founded on fictions, yet to certain purposes it is considered in the same manner as if the proceedings were real. For all the purposes of the suit, the lease is considered as a real possessory title. If it expire during the pendency of the suit, the plaintiff cannot recover at law without procuring it to be enlarged by the Court, and can proceed only for antecedent damages. *Ib.*

5. Therefore, a release or conveyance by the lessor of the plaintiff, pending the suit, only operates upon his reversionary interest, and does not extinguish the supposed prior lease, nor prevent a recovery on it. *Ib.*

*Et vide FRAUDS II. 6.*

**LIMITATION OF ACTIONS II.**

**LOCAL LAW II. IX. X. XI. (A)**

## EVIDENCE.

- I. Attendance of witnesses.
- II. Incompetency of witnesses from interest.
- III. General rules of evidence.
- IV. Verdicts and judgments of Courts of Record.
- V. Proof of records and judicial proceedings.
- VI. Public writings, not judicial.
- VII. Proof of private writings.
- VIII. Admissibility of parol evidence to explain, vary, or discharge written instruments.

## EVIDENCE I.

*Attendance of witnesses.*

1. All evidence on motions in this Court for a discharge upon bail, must be by way of deposition, and not *viva voce*. **IX Rule of Court, 1 Wheat. xv.**
2. *That the deponent is a seaman on board a gun-boat in a certain harbour, and liable to be ordered to some other place, and not to be able to attend the Court at the time of its sitting*, is not a sufficient reason for taking his deposition *de bene esse*, under the judiciary act of 1789, c. 20. s. 30. *The Samuel, 1 Wheat. 9. 16.*
3. In such a case, the proper course is to apply to the Court for a commission. *Ib.*
4. And even if the deposition might lawfully be taken, in such a case, without applying to the Court for its aid, still the deposition is taken *de bene esse*, not *in-chief*; and a deposition so taken can be read only when the witness himself is unattainable. *Ib.*
5. If such a deposition be offered, before, or at the time of trial, and used in the Court below, without objection, this Court may infer that the requisites of the law, in respect to proof of the ab-

sence of the witness, were complied with, or waived. *The Samuel, 1 Wheat. 9. 16.*

6. But its being filed, after the trial, by order of the Court below, will not justify such an inference. The party is not necessarily in Court after his cause is decided, and is not bound to know the fact that a deposition is thus ordered to be filed. *Ib.*

## EVIDENCE II.

*Incompetency of witnesses from interest.*

7. A witness interested to diminish certain admitted items in the plaintiff's account, is still a competent witness to disprove other items. *Smith v. Carrington, 4 Cranch, 62. 69.*

8. The principal obligor in a bond is not a competent witness for the surety in an action upon the bond. *Riddle v. Moss, 7 Cranch, 206.*

9. A., being sole owner of a bill of exchange, endorses it in blank, and delivers it to C. for collection, and when collected, the amount to be placed to the credit of A. and B. in account. C. collects the amount, but refuses to place it to the credit of A. and B., who settle their account with C., and pay him the balance. A. afterwards sues C. for the amount received upon the bills; B. is a competent witness for A., he, B., having no interest, that appeared, in the bills until they should be collected and carried to his credit jointly with A. *Taber v. Perrot & Lee, 9 Cranch, 39. 42.*

## EVIDENCE III.

*General rules of evidence.*

10. The general rule of evidence is, that the best evidence must be produced which the nature of the case admits, and which is in the power of the party. *Cooke v. Woodrowe, 5 Cranch, 13. 14.*

11. In consequence of that rule, the testimony of a subscribing witness to a written instrument must be had, if possible. *Cooke v. Woodrowe*, 5 *Cranch*, 13, 14.

12. But if it appears that the testimony of the subscribing witness cannot be had, after using due diligence for that purpose, the next best evidence is proof of his handwriting, which in such a case is admissible. *Ib.*

13. The defendants having ordered the plaintiff to purchase salt for them, and to draw on them for the amount, and he having so purchased and drawn, they are bound to accept and pay his bills; and if they do not, he may recover from them the amount of the bills and damages and costs of protest, (if he has paid the same,) upon a count for money paid, laid out, and expended, and the bills of exchange may be given in evidence on that count. *Riggs v. Lindsay*, 7 *Cranch*, 500.

14. Testimony, which is proper and legal evidence to establish a particular fact, may be rejected, if the fact does not appear to be relevant to the cause before the Court. *Turner v. Fendall*, 1 *Cranch*, 117. 132.

15. In a demurrer to evidence, the party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw, a Court ought to draw. *Powling v. United States*, 4 *Cranch*, 219. 221.

16. Hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge. *Mima Queen and Child v. Hepburn*, 7 *Cranch*, 290. 295.

17. That hearsay evidence supposes some better evidence which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule of its inadmissibility. *Ib.*

18. To this rule there are some exceptions which are as old as the rule itself. These are cases of pedigree, of prescription, of custom, and in some instances, of boundary. There are also matters of general and public history which may be received without that full proof which is necessary for the establishment of a private fact. *Mima Queen and Child v. Hepburn*, 7 Cranch, 290. 295.

19. The circumstance that the eye witnesses to a specific fact are dead, will not justify the admission of hearsay evidence to prove that fact. *Ib.*

20. If one defendant produce in evidence a letter from his co-defendant to the plaintiff, the latter may give in evidence the written declarations of that co-defendant to discredit the letter, *Riggs v. Lindsay*, 7 Cranch, 500. 503.

21. Where a witness, a clerk to the plaintiff, in an action of assumpsit for goods sold, swore that the several articles of merchandise contained in the account annexed to his deposition, were sold to the defendant by the plaintiff, and swore to the delivery of the goods; but as it was clear that he could not, even for a week, recollect each article which was enumerated, he accounted for his recollection by saying that they were entered in the plaintiff's day-book, partly by himself, and partly by another clerk, who was since dead, and that he had referred to this day-book: Held, that this was sufficient evidence to prove the sale and delivery of the goods. *McCoul v. Lekamp*, 2 Wheat. 111. 116.

22. Upon the plea of payment to an action of debt upon a bond conditioned to pay 500 dollars, evidence may be received of the payment of a smaller sum, with an acknowledgment by the plaintiff that it was in full of all demands; and from such evidence, if uncontradicted, the jury may and ought to infer payment of the whole. *Henderson v. Moore*, 5 Cranch, 11.

## EVIDENCE IV.

*Verdicts and judgments of Courts of Record,*

23. The sentence of a Court Martial, which has no jurisdiction over the case, is not conclusive evidence in an action brought in another Court, and will not protect the officer who executes it. *Wise v. Withers*, 3 Cranch, 331. 337.

24. The sentence of a Court of Prize is not conclusive to establish any particular fact, without which the sentence may have been rightly pronounced. *Maley v. Shattuck*, 3 Cranch, 458. 487.

25. A vessel libelled as enemy's property, is condemned as prize, if she act in such a way as to forfeit the protection to which she is entitled by her neutral character; as, for example, by resistance to search, or breach of blockade. *Ib.*

26. A sentence of a belligerent Prize Court, setting forth that the vessel in question "was cleared out for Cadiz, a port actually blockaded," and that the master "persisted in his intention of entering that port, after warning from the blockading force not to do so, in direct breach and violation of the blockade thereby notified"—is not conclusive evidence to falsify a warranty of neutrality contained in the policy of insurance on the vessel. *Fitzsimmons v. Newport Insurance Company*, 4 Cranch, 185. 198.

27. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases construed into an attempt to enter into that port, and has therefore been adjudged a breach of the blockade from the departure of the vessel. In such cases the *fact* of sailing is coupled with the *intention*, and the sentence of condemnation is thus founded on an actual breach of the blockade. The cause assigned for condemnation would be a justifiable cause, and it would be for the foreign Court alone to determine whether the testimony supported the allegation that the blockade was broken. Had the above sentence averred, that

the vessel had broken the blockade, or had attempted to enter the port of Cadiz after warning from the blockading force, the cause of condemnation would have been justifiable; and the assured could not, without controverting the conclusiveness of the sentence, have entered into any inquiry respecting the conduct of the vessel. *Fitzsimmons v. Newport Ins. Co.* 4 Cranch, 185. 198.

28. The sentence of a foreign Prize Court, condemning a vessel and cargo as prize for an attempt to break a blockade, is conclusive evidence against the insured, to falsify his warranty of neutrality, in an action upon the policy, notwithstanding the fact stated in the sentence as the ground of condemnation is negatived by the jury. *Croudson v. Leonard*, 4 Cranch, 434.

29. The doctrine of the conclusiveness of the sentences of foreign Prize Courts rests upon three considerations: the propriety of leaving the cognizance of prize questions exclusively to Courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility of fully investigating such cases in a Court of common law; and the impropriety of revising the decisions of the maritime Courts of other nations, whose jurisdiction is co-ordinate throughout the world. *Ib.* Per JOHNSON, J.

30. The doctrine of the conclusiveness of the sentences of foreign Prize Courts, is not novel; nor does it take its origin in an incorrect extension of the principle in *Hughes v. Cornelius*, (2 Shower, 232. *Ld. Raym.* 473. *Skinn.* 59.) The doctrine is coeval with the species of contract to which it is applied. *Ib.*

31. The doctrine of the conclusiveness of foreign prize sentences, in cases of insurance, results from the application of the same legal principle which prevails in respect to domestic judgments, and to the judgments and sentences of foreign Courts. *Ib.* Per WASHINGTON, J.

32. This rule, when applied to the sentences of Courts of Admiralty, whether foreign or domestic, produces the doctrine of their conclusiveness, upon the ground, that all the world are parties in an Admiralty cause. The insured is emphatically a

party; the master is his immediate agent, and is also bound to act for the benefit of all concerned, so that, in this respect, he also represents the insurer. *Croudson v. Leonard*, 4 Cranch, 434. Per WASHINGTON, J.

33. The only point expressly decided in *Hughes v. Cornelius*, was, that the sentence was conclusive as to the change of property effected by the condemnation. But the point in that case depended not upon some new principles peculiar to the sentence of foreign Courts, but upon the application of a general rule of law to such sentences. *Ib.* Per WASHINGTON, J.

34. The case of *Hughes v. Cornelius*, so far as it goes, places a foreign sentence upon the same foundation as a sentence or decree of a domestic Court, acting upon the same subject; and, by the general rule of law, the latter, if conclusive at all, is so as to the fact directly decided, as well as to the change of property produced by the establishment of the fact. *Ib.* Per WASHINGTON, J.

35. Hence, it follows, that if the sentence of a foreign Court of Admiralty be conclusive as to the property, it is equally conclusive as to the matter or fact directly decided. *Ib.* Per WASHINGTON, J.

36. The doctrine laid down in *Hughes v. Cornelius*, respecting foreign sentences, has been ever since considered equally applicable to questions of warranty in actions on policies of insurance, as to questions of property, in actions of trover. *Ib.* Per WASHINGTON, J.

37. The doctrine of the conclusiveness of foreign sentences, is not a doctrine invented in England since the period when English decisions have lost the weight of authority in the Courts of the United States. Although we are not bound by such decisions made since the revolution, yet we read and respect them as evidence of what the law was prior to that period; and the long series of decisions from the time of *Hughes v. Cornelius*, spoken of by the judges in *Lothian v. Henderson*, (3 Bos. & Pull. 499.) even if they had been made at Nisi Prius, would prove the sense of all the judges of England, as well as of the bar, of the

correctness and legal validity of the rule. *Croudson v. Leonard*, 4 Cranch, 434. Per WASHINGTON, J.

38. By the common law, the judgment of a foreign Court is conclusive where the same matter comes again incidentally in question ; it is only *prima facie* evidence where the party claiming the benefit of it applies to the Courts in England to enforce it. *Ib. 442.* Per WASHINGTON, J.

39. Neither a domestic nor a foreign judgment is even *prima facie* evidence between those not parties to it, and those claiming under them. *Ib.* Per WASHINGTON, J.

40. In a case of *garantie* and indemnity, a judgment against the party to be indemnified, if fairly obtained, and with notice to the guaranteee, is admissible evidence in a suit against him on his contract of indemnity. *Clark's executors v. Carrington*, 7 Cranch, 308. 322.

41. In an action upon a policy warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign Prize Court, upon the ground of breach of blockade, is not conclusive evidence of a violation of the warranty. *Marine Ins. Co. v. Woods*, 6 Cranch, 29. 44.

42. Verdicts and judgments are evidence between parties and privies only. *Wood v. Davis*, 7 Cranch, 271. *Davis v. Wood*, 1 Wheat. 6.

43. A final account settled by an administrator with the Orphan's Court, is not conclusive evidence in his favour, upon the issue of *devastavit vel non* in an action by a creditor, it being *res inter alios acta*. *Beatty v. State of Maryland*, 7 Cranch, 281.

44. The Constitution of the United States declares, art. 4. s. 1. that, "Full faith and credit shall be given, in each State, to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof."

By the act of the 26th of May, 1790, c. 38. [xi.] Congress, after providing for the mode of authenticating the records and judicial proceedings of the State Courts, have declared, that "the records

and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every Court within the United States, as they have by law or usage in the Courts of the State from whence the said records are or shall be taken."

And by the supplementary act of March 29th, 1804, c. 409, it is declared, that the provisions of the original act of 1790, c. 38. shall apply as well to the records and Courts of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the records and Courts of the several States.

By the above acts, Congress has prescribed the effect of the records and judicial proceedings of one State in another, and has declared that a judgment obtained in one State shall have the same effect in another, as it would have in the State where it was obtained. *Mills v. Duryee*, 7 Cranch, 481. 483. *Hampton v. McConnel*, 3 Wheat. 234.

45. If the judgment be conclusive evidence in the Courts of the State where it was obtained, it is conclusive in every other State, District, and Territory in the Union. *Mills v. Duryee*, 7 Cranch, 481. 484.

46. When Congress gave the effect of a record to the authenticated copy of the judicial proceedings of one State, in another, it gave all the collateral consequences; among which are, that, if conclusive between the parties, it cannot be denied but by the plea of *nul tiel record*. *Ib.*

47. The proof prescribed by the act is of as high a nature as an inspection, by the Court, of its own record, or as an exemplification would be in any other Court of the same State. *Ib.*

48. But such exemplification would be conclusive in the Courts of the same State, and the copy authenticated in the manner prescribed by the acts of Congress is, therefore, conclusive in every Court within the United States. *Ib.*

49. The common law gives to judgments of the State Courts the effect of *prima facie* evidence in the Courts of other States; but the constitution contemplates a power in Congress to give a

conclusive effect to such judgments, which it has done in the acts of 1790, and of 1804. *Mills v. Duryea*, 7 Cranch, 481. 484.

50. JOHNSON, J., dissented in the above case, upon the grounds, 1st. That the judgment of an independent unconnected jurisdiction is what the law calls a foreign judgment, and *nil debet* is the only proper plea to such a judgment. 2dly. That the decision was not necessary to give effect to the constitution and the acts of Congress; for by receiving the record of the State Court, properly authenticated, as conclusive evidence of the debt, full effect is given to the constitution and the law. 3dly. That receiving the plea of *non res judicata* record as the only plea in such a case, might put it out of the power of the Court to prevent the execution of judgments obtained by fraudulent attachments or other unjust proceedings. *Ib.*

51. Upon the issue of *non assumpsit*, the record of a former judgment between the same parties may be given in evidence by the defendant, with parol proof that it was for the same cause of action. The controversy having passed *in rem judicatum*, and the identity of the causes of action being established, the law will not suffer them again to be drawn into question. *Young v. Black*, 7 Cranch, 565. 567.

52. The decision of a Court of peculiar and exclusive jurisdiction, is completely binding upon the judgment of every other Court where the same subject matter comes incidentally in controversy. *Gelston v. Hoyt*, 3 Wheat. 246. 315.

53. This principle is applied to the sentences of ecclesiastical Courts, in the probate of wills and granting of administrations of personal estate; to the sentences of Prize Courts in all matters of prize jurisdiction; and to the sentences of Courts of Admiralty, and other Courts acting *in rem*, either to enforce forfeitures, or to decide civil rights. *Ib.*

54. A sentence of condemnation, by a Court of competent jurisdiction, proceeding *in rem*, is, in an action of trespass for the property seized, conclusive evidence against the title of the plaintiff. *Ib.*

55. A sentence of acquittal is, in such a case, equally conclusive. The rule is reciprocal; and in all cases in which the sentences favourable to the party are to be admitted as conclusive evidence for him, the sentences, if unfavourable, are, in like manner, conclusive evidence against him. *Gelston v. Hoyt*, 3 Wheat. 246. 315.

56. All persons having an interest or title in the subject matter, are, in law, deemed parties to proceedings *in rem*; and the decree of the Court is conclusive upon all interests and titles in controversy before it. *Ib.*

57. All persons having a right or interest in establishing a forfeiture, (as the seizing officer has,) are, in legal contemplation, parties or privies to the suit brought for the forfeiture, and concluded by the sentence. *Ib.*

58. But if the seizing officer were a mere stranger, he would still be bound by the sentence, because, being *in rem*, it is conclusive upon all the world. *Ib.*

59. A sentence of acquittal in the District Court, upon a seizure for a municipal forfeiture, with a denial of a certificate of reasonable cause of seizure, is conclusive evidence that no forfeiture was incurred, and that the seizure was tortious, in an action of trespass brought against the seizing officer in any other Court. *Ib.*

60. Where the vessel and cargo were libelled in the District Court as prize of war, and no claim being put in for the vessel, she was condemned as enemy's property; the sentence of condemnation of the vessel was held not to be conclusive against the claimants of the cargo, in an incidental question arising in the appellate Court. *The Mary*, 9 Cranch, 126. 142.

61. The owner of the cargo cannot be prejudiced by the contumacy of the owner of the vessel. That contumacy ought not to prevent the Court (whether it be the same or an appellate tribunal) from looking into testimony concerning proprietary interest in the vessel, so far as the rights of the claimants of the cargo depend on that interest. *Ib.*

62. This case is distinguishable from those decided on policies

of insurance, not only by the circumstance, that the cause, respecting the vessel and cargo, came on at the same time, before the same Court, but by other essential differences in reason and in law. *The Mary*, 9 Cranch, 128. 142.

63. The decisions of a Court of exclusive jurisdiction, are necessarily conclusive on *all other Courts*, because the subject matter is not examinable in them. But with respect to the Court of exclusive jurisdiction itself, its decisions are no farther conclusive, than the judgments and decrees of Courts of Common Law and Equity; they bind the subject matter between parties and privies. *Ib.*

64. It is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. *Ib.*

65. Where the proceedings are *in rem*, notice is served upon the thing itself. This is necessarily a constructive notice of the seizure to all who have any interest in the thing, or who can assert any title to it. Every such person may fairly be considered as a party to the libel. *Ib.*

66. But where a vessel and the cargo are libelled, those who have not an interest in the vessel which could be asserted in the Court of Admiralty, have no notice of the seizure, and cannot be considered as parties in the cause so far as respects the vessel. And if a re-examination of the facts respecting the vessel, becomes incidentally necessary on the adjudication of the cargo, claimed by another party, such re-examination may take place, either in the same or a different Court. *Ib.*

67. This doctrine is not inconsistent with the decision that the sentence of a foreign Court of Admiralty, condemning a vessel or cargo as enemy's property, is conclusive in an action against the underwriters on a policy of insurance, in which the property is warranted neutral. *Ib.*

68. It is not inconsistent with that decision, because the question of prize is one of which the Courts of municipal law have no direct cognizance, and because the owners of the vessel and

cargo insured must necessarily be parties to the libel against the vessel and the cargo. *The Mary*, 9 Cranch, 126. 142.

69. In general, judgments and decrees are evidence only in suits between parties and privies : but the doctrine is wholly inapplicable to a case where the judgment or decree is introduced, not as, *per se*, binding on any rights of the other party, but as an introductory fact to a link in the chain of the party's title who introduces it, and constituting a part of the muniments of his estate ; as where it is necessary to establish the legal validity of a deed made under the authority of a decree in Chancery, there the decree may be given in evidence, by or against a stranger to the suit in Chancery, as well as between parties and privies. *Barr v. Gratz*, 4 Wheat. 213. 220.

#### EVIDENCE V.

##### *Proof of records and judicial proceedings.*

70. The laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the Courts of other countries, unless proved as facts. *Talbot v. Seaman*, 1 Cranch, 1. 38.

71. The public laws of a foreign nation, on a subject of common concern to all nations, promulgated in the United States by the national executive, may be read in evidence in the Courts of the United States without further authentication or proof. *Ib.*

72. Foreign laws are facts, which must, like other facts, be proved to exist before they can be received in a Court of justice. The sanction of an oath is required for their proof, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual. *Church v. Hubbard*, 2 Cranch, 187. 237.

73. The certificate of a consul of the United States in a foreign country, under his official seal, is not sufficient proof of the laws of that country. *Ib.*

74. The certificate of the proceedings of a foreign Court of

justice, under the seal of arms of a person, who states himself to be Secretary of State for foreign affairs, is not admissible evidence. *Church v. Hubbard*, 2 *Cranch*, 238.

75. A certificate, under the private seal of the person giving it, cannot be known to this Court, and of course can authenticate nothing. *Ib.*

76. Foreign judgments are authenticated: 1st. By an exemplification under the great seal. 2dly. By a copy proved to be a true copy. 3dly. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated. *Ib.*

77. These are the usual and most proper, if not the only modes of verifying foreign judgments. But if they are all beyond the reach of the party, other testimony inferior in its nature may be received. *Ib.*

78. If the decrees of the colonies of a foreign country are transmitted to the seat of its government, and registered in the department of State, a certificate of that fact under the great seal, with a copy of the decree authenticated in the same manner would be sufficient *prima facie* evidence. *Ib.*

79. Translations of papers in a foreign language cannot be read in evidence on the certificate of a consul of the United States resident in the foreign country. Interpreters are always sworn, and the translation of a consul, not on oath, can have no greater validity than that of any other respectable man. *Ib.*

80. In an action on a policy of insurance, the usage of trade may be proved by parol evidence, although such usage originated in a written law or usage of the government of the country where it prevails. *Livingston & Gilchrist v. Maryland Ins. Co.* 7 *Cranch*, 506. 539.

81. Copies of the proceedings of a foreign Prize Court are admissible in evidence when certified under the seal of the Court by the deputy registrar, whose official character is certified by the judge of the Court, and that of the judge by a notary public. Being a Court of the law of nations, this is a proper mode

of certifying its proceedings. *Yeaton v. Fry*, 5 Cranch, 335. 343.

82. In order to prove a condemnation in a foreign Prize Court, it is only necessary to produce *the libel and the sentence*. It is a useless practice to read the proceedings at length. *Marine Ins. Co. v. Hodgson*, 5 Cranch, 206. 220.

83. The depositions in the proceedings of a foreign Prize Court, which proceedings are read by the plaintiff on a policy of insurance for no other purpose than to prove the condemnation, are not evidence to prove any other fact. *Ib.*

84. If foreign laws respecting trade be not positively shown to have been in writing as public edicts or statutes, they may be proved by parol testimony. *Livingston v. Maryland Ins. Co.* 6 Cranch, 274. 280.

85. The act of the 26th of May, 1790, c. 38. [xi.] declares, that the records and judicial proceedings of the Courts of any State shall be proved and admitted in any other Court within the United States by the attestation of the clerk and the seal of the Court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form of law.

If the clerk of a Court certify at the foot of a paper purporting to be a record, "that the foregoing is truly taken from the record of the proceedings" of his Court, and if the judge, chief justice, or presiding magistrate, certify that such attestation of the clerk is in due form of law, it is to be presumed that the paper so certified is a full copy of all the proceedings in the case, and it is admissible in evidence. *Ferguson v. Harwood*, 7 Cranch, 408. 412.

86. But if the writing produced do not purport to be a record, but a mere transcript of minutes extracted from the docket of the Court, it is not admissible in evidence. *Ib.*

87. A copy of a deed from the records of a Court in one State, certified by the clerk to be a true copy, without a certificate, such as the act of Congress requires, of the presiding judge that the attestation is in due form, is not admissible in evidence in

the Courts of another State or District, &c. *Drummond's administrators v. Magruder & Co.'s trustees*, 9 *Cranch*, 122. 125.

## EVIDENCE VI.

## Public writings not judicial.

88. The defendants in error were owners of the privateer Pilgrim, which, in November, 1778, captured a brig as prize, and sent her into Martinique, where the plaintiff in error resided as a public agent of the United States. The prize brig appeared, by her papers, to be Danish property, and the cargo to be Portuguese property, both nations being at peace with France and the United States. There being no Prize Court at Martinique, the Governor of the Island ordered the cargo to be sold, and the freight paid to the Danish brig, which he released ; and the net proceeds of the cargo to remain in the hands of the plaintiff in error, to be delivered to whom it should belong agreeably to the judgment and orders of Congress. In an action of assumpsit for the proceeds, brought by the defendants in error against the plaintiff in error, (no condemnation ever having passed upon the proceeds in any Court of Admiralty,) it was held, 1st. That the certificate of the Governor of Martinique of his proceedings in the case, was admissible evidence. 2dly. That the letters written to Congress by the plaintiff in error, in his official capacity, respecting his acts in relation to the property, and the resolutions of Congress on the same subject, were admissible evidence. 3dly. That copies of these papers from the department of State were admissible evidence. *Bingham v. Cabot et al.* 3 *Dall.* 19. 39.

89. The official certificate of a survey of lands, returned by a sworn officer upon oath, cannot be invalidated by a particular fact tending to show an impossibility that the survey could have been made in the time intervening between the date of the entry and the date of the certificate of survey. *Pollard v. Dwight*, 4 *Cranch*, 421. 428.

90. When a civil war rages in a foreign nation, one part of

which separates itself from the old established government, and erects itself into a distinct government, the Courts of the Union must view such newly constituted government, as it is viewed by the legislative and executive departments of the government of the United States: and the same testimony, which would be sufficient to prove that a vessel or person is in the service of an acknowledged State, is admissible to prove that they are in the service of such newly erected government. Its seal to a commission cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits; and the fact, that a vessel or person is in the service of such government, may be established otherwise, should it be impracticable to prove the seal. *The United States v. Palmer*, 3 Wheat. 610. 634. 642.

91. Where the privateer, cruising under such a commission, was lost, subsequent to the capture in question, the previous existence of the commission on board was allowed to be proved by parol evidence. *The Estrella*, 4 Wheat. 298. 303.

92. On an indictment for piracy, the national character of a merchant vessel of the United States may be proved without the production of the certificate of registry, or evidence that it was seen on board. *United States v. Furlong et al.* 5 Wheat. 184. 199.

93. The books of a corporation established for public purposes, are evidence of its acts and proceedings. *Owings v. Speed*, 5 Wheat. 420.

## EVIDENCE VII.

### *Proof of private writings.*

94. The defendant having read a letter from the plaintiff's agent, in answer to a letter from himself, cannot give in evidence a copy of his own letter, without proving it to be a true copy by a witness. *Smith v. Carrington*, 4 Cranch, 62. 70.

95. To introduce into a cause the copy of any paper, the truth of that copy must be established, and sufficient reasons for

the non-production of the original must be shown. *Smith v. Carrington, 4 Cranch, 62. 70.*

96. If, in the above case, the answer had authenticated the whole letter from the defendant, the copy of that letter need not have been offered, since its whole contents would have been proved by the answer to it. If its whole contents were not proved by the answer, then the part not so proved was wholly unauthenticated, and may have formed no part of the original letter. The copy was, therefore, improper testimony. *Ib.*

97. Where a deed is more than thirty years old, and is proved to have been in the possession of the lessors of the plaintiff in ejectment, and actually asserted by them as the ground of their title in a Chancery suit, it is, in the language of the books, sufficiently accounted for, and is admissible in evidence without the regular proof of its execution by the subscribing witnesses. *Barr v. Gratz, 4 Wheat. 213. 221.*

### EVIDENCE VIII.

#### *Admissibility of parol evidence to explain, vary, or discharge, written instruments.*

98. A promise or undertaking to pay the debt of another must be entirely in writing, according to the Statute of Frauds, and cannot be added to, or varied, nor so far explained by parol evidence, as to affect its import. *Clarke v. Russell, 3 Dall. 415. 424.*

99. A bill of parcels delivered by I., stating the goods as bought of D. and I., is not conclusive evidence against I. that the goods were the joint property of D. and I.; but the real circumstances may be explained by parol. *Harris v. Johnston, 3 Cranch, 311. 318.*

100. In such a case, if part of the goods were the sole property of D., and the residue the sole property of I., and if I. had authority from D. to sell D.'s part, I. may maintain an action for the whole in his own name. *Ib.*

101. Parol testimony, that a bond or other written instrument is delivered as an escrow, is admissible. *Pawling v. United States, 4 Cranch, 219. 222.*

102. If one of the obligors, at the time of executing a bond, in the presence of some of the other obligors, say, "We acknowledge this instrument, but others are to sign it;" this is evidence from which the jury may infer a delivery, as an escrow, by all the obligors who were then present. *Ib.*

103. Parol testimony is not admissible, in an action on the covenant of seizin, to prove prior claims upon the land. *Pollard v. Dwight, 4 Cranch, 421. 432.*

104. An alteration or addition in a deed; as by adding a new obligor, or an erasure, as by striking out an old obligor, if done with the consent of all the parties to the deed, does not avoid it; and that whether the alteration or erasure be made in pursuance of an agreement and consent, prior or subsequent to the execution of the deed: and such consent may be proved by parol evidence. *Speake et al. v. United States, 9 Cranch, 28. 37.*

105. The cases to be found in the books, in which erasures, interlineations and alterations in deeds, have been held to avoid them, are cases in which no such consent had been given. *Ib.*

106. This principle of letting in parol evidence to prove alterations in a deed to be made by consent, is not within the mischiefs intended to be corrected by the statutes of frauds; for if the objection applied to the case, it would equally apply to such alterations when made before the execution of the deed; since, if not taken notice of by a memorandum on the deed itself, they must be proved in the same manner. *Ib.*

107. The parol evidence is not admitted to explain or contradict the terms of the written contract, but only to ascertain what those written terms are. *Ib.*

108. On *non est factum*, the present validity of the deed is in issue; and every circumstance that goes to show that it is not the deed of the party, is proveable by parol evidence. It is therefore of necessity that the other party should support it by the same evidence. *Ib.*

109. The fact that there is an erasure or interlineation on the face of the deed, does not, of itself, avoid it. Parol evidence is let in to show whether it has been made under circumstances which the law does or does not warrant. *Speake et al. v. United States*, 9 Cranch, 28. 37.

110. LIVINGSTON, J. dissented from the above opinion, upon the ground, that no change whatever in a sealed instrument, after its execution, which may increase the liability, or be, in any way, to the prejudice of the party whose deed it is, should be imposed on him by parol testimony; and so, *vice versa*, that no alteration which may be, in any way, injurious to the grantee or obligee, should be set up by the other party; but that the terms in which the deed is originally executed should alone be binding, until alterations are introduced into it by the same solemnities which gave existence to the first. And such, in his opinion, was the salutary rule of the common law. *Ib.*

111. Where a check was drawn by a person who was the cashier of an incorporated bank, and it appeared doubtful upon the face of the paper, whether it was an official or a private act, parol evidence was admitted to show that it was a private act. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326. 336.

112. The acts of agents do not derive their validity from professing on the face of them to have been performed in the exercise of their agency; but the liability of the principal depends upon the facts, 1st. That the act was done in the exercise, and, 2dly. Within the limits of the power delegated: and in ascertaining these facts, as connected with the execution of written instruments, except deeds, parol testimony is admissible. *Ib.*

## EXECUTOR.

1. The appointment of an executor; and his acceptance of the office, constitutes a complete legal owner of the personal estate of the deceased; and a temporary administration cannot be granted by the Ordinary, (except by some special statute law,) unless the executor is under an actual legal disability to perform the functions of his office. *Griffith v. Frazier*, 8 Cranch, 9. 21.

2. Until probate of the will, and until letters testamentary are obtained, the executor cannot obtain any judgment, because it cannot appear that he is executor. There is, therefore, an absolute necessity for appointing some person who, until probate, shall take care of the estate. *Ib.*

3. But this is not the case with an executor, who, after taking out letters testamentary, absents himself from the State. He is still capable of performing, and is still bound to perform, all the duties of an executor. There exists no legal disability in the executor, and, consequently, there is no necessity for transferring to another those powers which the testator has conferred on a person selected by himself. *Ib.*

4. The power of appointing an administrator, *durante absen-tia* of an executor who has proved the will, was not exercised by the Ordinary in England anterior to the statute 38 Geo. III. c. 87, which first gave him that power. *Ib.*

5. There is a well known distinction between an erroneous act or judgment of a tribunal having cognizance of the subject matter, and the act or judgment of a tribunal having no cognizance of the subject. *Ib.*

6. The difficulty of distinguishing those cases of administration, in which a Court, having general testamentary jurisdiction, may be said to have acted on a subject not within its cognizance, and of marking the precise line of distinction, does not prove that no such line exists. *Ib.*

7. To give jurisdiction to the Ordinary, a case, in which, by law, letters of administration may issue, must be brought before him. *Griffith v. Frazier*, 8 *Cranch*, 9. 21.

8. In the common case of intestacy, letters of administration must be granted to some person by the Ordinary ; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority. *Ib.*

9. But if administration be granted on the estate of a person not really dead, the act is totally void.

10. And if administration is granted on the estate of a deceased person, whose executor is present, and in the constant performance of his executorial duties, such an appointment is absolutely void. *Ib.*

11. The appointment of an executor vests the whole personal estate in the person so appointed. *Ib.*

12. The executor holds as trustee for the purposes of the will, but he holds the *legal* title in all the chattels of the testator. *Ib.*

13. The executor is, for the purpose of administering the chattels of the testator, as much the legal proprietor of them as was the testator himself while alive. *Ib.*

14. This proprietary interest is incompatible with any power in the Ordinary to transfer these chattels to any other person by the grant of administration on them. His grant can pass nothing : it conveys no right, and is a void act. *Ib.*

15. The executor may maintain a suit, while he is actually resident abroad ; nor is his absence a good plea in bar. *Ib.*

16. Letters testamentary, when once granted, are not revocable by the Ordinary. He cannot annul them, nor transfer the legal interest of the executor to any other person. *Ib.*

17. The cases in which administration has been granted, notwithstanding the existence of a will, are cases in which it is not apparent that there is any person possessing a right in the chattels of the testator ; or cases in which that person is legally disqualified from acting. *Ib.*

18. Thus, where administration is granted, pending a dispute

respecting a will, it is not certain that there is an executor, or that there is a will. *Griffith v. Frazier*, 8 Cranch, 9. 21.

19. So, if administration be granted during the minority of an executor, it is because the executor is legally disqualified from acting, and indeed has not taken, and could not take upon himself the trust. *Ib.*

20. An infant executor may, when of age, reject all the rights and powers conferred by the will; and, consequently, the interest is not yet a vested interest. *Ib.*

21. So, in the case of an absent executor, who has not yet made probate of the will and qualified. He having as yet no evidence that he is executor, not yet being able to act as one, and having it in his power to renounce the office; the Ordinary is not yet deprived of that power which he possesses to appoint a person to represent a dead man who has no representative. *Ib.*

22. Though the Ordinary may have jurisdiction to grant administration in cases where the executor has not qualified, and his act, though erroneous, may be valid till repealed; yet in cases where there is a qualified executor, the Ordinary can have no jurisdiction, and his act is in itself an absolute nullity. *Ib.*

23. There is no distinction, in this respect, between the grant of an *absolute* administration, and that of a *temporary* administration. *Ib.*

24. If during the legal capacity of the executor to perform the duties of his trust, (which he may do by his agents if absent,) the Ordinary grant administration, either absolute or temporary, to another person, such grant is absolutely void for want of jurisdiction. *Ib.*

25. This defect of jurisdiction renders such an administration a nullity, where it is collaterally and incidentally brought in question, as well as where it forms the direct question before the Court. *Ib.*

26. Indeed, the question has never been examined in a Court sitting as an appellate Court. The question has never been, whether the letters of administration shall be revoked or not; but whether they were originally void, so as not to warrant the

## FACTOR.

particular act in support of which they are alleged. *Griffith v. Frazier*, 8 Cranch, 9. 21.

27. If a judgment be rendered against one as executor, who is not executor, it does not bind the estate of the testator, and an execution upon such a judgment could not legally be levied upon such estate. *Griffith v. Frazier*, 8 Cranch, 9. 29.

28. By the bankrupt act of 1800, c. 173. [xix.] s. 13. upon the death of an assignee, the right of action for a debt due to the bankrupt, vests in the executor or administrator of the assignee. *Richards et al. v. Maryland Ins. Co.* 8 Cranch, 84. 93.

*Et vide CHANCERY III. (A)*

*LEX LOCI III.*

*LOCAL LAW VIII.*

## FACTOR.

1. If foreign merchants send out, by their general agent, written orders to their factor in this country, to purchase tobacco upon their account, but to ship it in the name of the factor, and by those orders the factor is referred to the verbal communications of the general agent, who undertakes to order the tobacco to be shipped in the name of another person, and declares that he has authority from the foreign merchants thus to control and vary their orders; the factor is justified in obeying the new orders of the general agent, though contrary to the first written orders. *Manella v. Barry*, 3 Cranch, 415.

2. A promise by a merchant's factor or agent, that he would write to his principal to get insurance done, does not bind the principal to insure. *Randolph v. Ware*, 3 Cranch, 503.

*Et vide AGREEMENT II. (B)*

## FRAUDS.

- I. *Frauds at Common Law, and under the statutes 13 Eliz. c. 5. and 27 Eliz. c. 4.*
- II. *Statute of Frauds, 29 Car. II.*

## FRAUDS I.

*Frauds at Common Law, and under the statutes 13 Eliz. c. 5. and 27 Eliz. c. 4.*

1. The acts of the 13th *Eliz.* c. 5. and 27th *Eliz.* c. 4. respecting fraudulent conveyances, are merely declaratory of the principles of the common law. *Hamilton v. Russel*, 1 *Cranch*, 310. 316.
2. An unconditional sale, where the possession does not accompany and follow the deed, is, with respect to creditors, on the sound construction of the statute of *Eliz.* a fraud. *Ib.*
3. The distinction taken by modern decisions is between a deed purporting on the face of it to be absolute, so that the separation of the possession from the title is incompatible with the deed itself; and a deed made upon condition which does not entitle the vendor to immediate possession. *Ib.*
4. The want of possession, in the case of an absolute deed, is not merely evidence of fraud to be submitted to the jury under the direction of the Court, but is such a circumstance *per se*, as makes the transaction fraudulent in point of law. *Ib.*
5. A deed made upon a valuable and adequate consideration, which is actually paid, and the change of property is *bona fide*, or such as it purports to be, cannot be considered as a conveyance to defraud creditors. *Wheaton v. Sexton*, 4 *Wheat.* 503. 507.
6. A mortgage of lands made by a collector of the revenue to

his surety in his official bond, to indemnify the surety against his responsibility, and also to secure him for his existing and future endorsements for the mortgagor, is not fraudulent as to creditors. *The United States v. Hooe et al.* 3 Cranch, 73. 88.

7. The meaning of the word "good" in the statute of frauds is the same with *valuable*. *Hodgson v. Butts*, 3 Cranch, 140. 156.

8. The judgments of a Court of competent jurisdiction, although obtained by fraud, are not absolutely void; and, therefore, all acts performed under them are valid, so far as respects third persons. *Simms v. Slacum*, 3 Cranch, 300. 306.

9. A sheriff who levies an execution under a judgment fraudulently obtained, is not a trespasser, nor can a person who purchases at a sale under such an execution, be compelled to relinquish the property he has purchased. *Ib.*

10. When the person who has committed a fraud in order to obtain a judgment, attempts to avail himself of it, so as to discharge himself from a previously existing obligation, or to acquire a benefit, the judgment thus obtained is void as to that purpose; but it may well be doubted whether a penalty would be incurred, even by the person committing the fraud, for an act which the judgment would sanction. *Ib.*

11. If an imprisoned debtor fraudulently obtains a judgment in his favour, in consequence of which he goes at large, the sheriff cannot retake him on suspicion that the judgment is fraudulent, nor be liable for an escape on the proof of such fraud. *Ib.*

12. A debtor who has departed from the prison rules under a judgment of discharge granted in due form by a competent tribunal, has not committed an escape even to charge himself, much less will it impose on his security a liability for the debt. *Ib.*

13. A discharge from the prison rules, under an insolvent act, although obtained by fraud, is a discharge in *due course of law*, and upon such discharge no action can be sustained upon a bond with the following condition: "Now if the said J. S. do well and truly keep himself within the prison rules, &c. and from thence not depart, until he shall be discharged by *due course of*

*law, or pay the aforesaid sum," &c. Simms v. Slacum, 3 Cranch, 300. 306. Ammidon v. Smith, 1 Wheat. 447. 457.*

14. Under the 4th sec. of the registry act of Virginia of the 13th of December, 1792, which provides, "that all conveyances of lands," "and all deeds of settlement upon marriage, wherein either lands, slaves, money, or other personal thing, shall be settled," "and all deeds of trust and mortgages whatsoever," "shall be void as to all creditors and subsequent purchasers, unless they shall be acknowledged, or proved and recorded according to the directions of this act; but the same, as between the parties and their heirs, shall nevertheless be valid and binding"—the words "*all creditors and subsequent purchasers,*" are to be limited to the creditors of, and subsequent purchasers from, *the grantor*. *Pierce v. Turner, 5 Cranch, 154. 165.*

15. Under the same statute, a settlement, made in consideration of an intended marriage, which is afterwards solemnised, and conveying the wife's lands and slaves to trustees, by a deed to which the husband was a party, although not recorded, protects the property from the creditors of the husband. *Ib.*

16. A subsequent purchaser, with notice of a prior unrecorded deed, cannot prevail against the title of the first purchaser. *Pierce v. Turner, 5 Cranch, 154. 167.*

17. A magistrate who has received a deed of trust from an insolvent debtor, which deed is fraudulent in law as to creditors, is incompetent to sit as a magistrate in the discharge of the debtor under an insolvent law. The discharge so obtained is not a discharge *by due course of law*. *Slacum v. Simms, 5 Cranch, 363.*

18. A person cannot be charged with fraudulently secreting a deed, from the mere fact of omitting to place it on record, provided he uses all the diligence in recording it which the law requires. If subsequent purchasers, without notice, sustain an injury within the time allowed for recording a deed, the injury is to be ascribed to the law, not to the individual who has complied with its requisitions. *Shirras et al. v. Caig & Mitchel, 7 Cranch, 34. 50.*

19. Under the registry act of Ohio, which provides that certain deeds "shall be recorded in the county in which the lands, tenements, and hereditaments, so conveyed and affected, shall be situate, within one year after the day on which such deed or conveyance was executed; and, unless recorded in the manner and within the time aforesaid, shall be deemed fraudulent against any subsequent *bona fide* purchaser without knowledge of the existence of such former deed of conveyance;" lands lying in Jefferson county were conveyed by deed; and a new county, called Tuscarawas county, was erected, partly from Jefferson, after the execution, and before the recording of the deed, in which new county the lands were included; and the deed was recorded in Jefferson: *Held*, that this registry was not sufficient either to preserve its legal priority, or to give it the equity resulting from constructive notice to a subsequent purchaser. *Astor v. Wells*, 4 *Wheat.* 466. 486.

20. Under the statute of fraudulent conveyances of Ohio, which provides, that "every gift, grant, or conveyance of lands, tenements, hereditaments, &c. made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or deceive the person or persons who shall purchase such lands, &c. shall be deemed utterly void and of no effect;" a *bona fide* purchaser, without notice, cannot be affected by the intent of the grantor to defraud creditors. *Ib.* 487.

*Et vide AGREEMENT III. (B)*

*CHANCERY II.*

*GUARANTIE III. V.*

*LOCAL LAW II. 43. VII. 86. 87. XI. (D) 270. 271.  
272.*

## FRAUDS II.

*Statute of Frauds, 29 Car. II. c. 3.*

21. The 4th section of the statute of frauds, 29 Car. II. c. 3. enacts, that no action shall be brought in the cases specified,

"unless the *agreement* on which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c. The 1st section of the Virginia statute of frauds enacts, that no action shall be brought in the specified cases, "unless the *promise* or agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c. The reasoning of the English judges, in the cases in which they have decided that the consideration ought to be in writing, turns upon the word *agreement*, of which the consideration forms an integral part. This reasoning does not apply to the act of Virginia, in which the word "*promise*" is introduced. *Violett v. Patton*, 5 *Cranch*, 142. 151.

22. Where the plaintiff declared in assumpsit, stating that he was owner of a plat and certificate of survey, for lands lying in Kentucky, for which he was entitled to a patent from the government of that State, and that the defendant, without authority, transferred the plat and certificate, in the name of C. M. to J. D. and the defendant, by which wrongful act the patent for the land was issued to the said J. D. and the defendant, to the plaintiff's great injury; and that the defendant afterwards promised the plaintiff to pay to him the sum of £700, *for the said injury and loss of the said land, assigned as aforesaid*, and the plaintiff at the same time agreed to the same terms, and to accept of the said compensation in full of all claims and demands *for the said land, and for the injury aforesaid*. To which the defendant pleaded, that neither the said promise, nor any memorandum thereof, was made in writing, and the plaintiff demurred. *Held*, that this was an agreement for the sale of lands, and not being in writing, was void under the statute of frauds. *Hughes v. Moore*, 7 *Cranch*, 176. 191.

23. There is no distinction between the sale of lands to which a man has only an equitable title, and a sale of lands to which he has a legal title. They are both equally within the statute of frauds. *Ib.*

24. And where the same plaintiff also declared in another count, *stating his title*, and the injury sustained by him to the

same effect as above, and then stating a conversation between the plaintiff and the defendant, concerning a compensation for the loss, and a liquidation of the damages sustained by the plaintiff, by reason of the misconduct and wrong doing of the defendant in the premises, *and of the vesting J. D. and the defendant with the legal title to the said land*; and it was then agreed by the defendant, on his part, in consideration of the premises, and of the just claims of the plaintiff, for *compensation and damages* as aforesaid, that the defendant should pay to the plaintiff, in satisfaction of the same, the sum of £700, &c. And the plaintiff then and there agreed, on his part, to accept of the said sum in full compensation of his just claims as aforesaid, and upon the same being secured, &c. to release and quitclaim to the defendant, all his, the plaintiff's claims and demands whatsoever, for compensation, redress, or damages, arising from the wrong doing and misconduct of the defendant in the premises, *and from the vesting the defendant and the said J. D. with the legal title to the said land*. To this count, also, the statute of frauds was pleaded in bar, and upon demurrer, the agreement, as therein stated, was held to be within the statute, as importing a sale of lands, and the sum of money stipulated to be paid, being, in contemplation of the parties, *to extinguish the plaintiff's title*.

*Hughes v. Moore, 7 Cranch, 176. 191.*

25. The plaintiff, in the above cause, also stated, in another count, his claim to be compensated *for the loss sustained by his land being granted*, without his consent, to the defendant and J. D.; averring, that a conversation was held between the parties, and that propositions for a compromise were made, touching the compensation and indemnification of the plaintiff, and it was then and there agreed by the defendant, in consideration of the just claims of the plaintiff to be compensated for the damage and injury occasioned by the misconduct of the defendant in the premises, and in consideration of the defendant *having procured and obtained a patent to be completed and issued to the defendant and the said J. D., for the said land*, that he, the defendant, would pay to the plaintiff one other sum of £700; which sum

the plaintiff agreed to accept in satisfaction of his just claims to compensation arising from the causes and considerations last aforesaid. To this count the statute of frauds was also pleaded, and upon demurrer, the contract, as stated in it, was held to be within the statute, as the payment of the money agreed to be paid, *would have extinguished the plaintiff's right to the land in question*, and it was thus substantially a contract for the sale of lands. *Hughes v. Moore*, 7 Cranch, 176. 191.

26. An agreement, by parol, between two proprietors of adjoining lands, to employ a surveyor to run the dividing line between them, and that it should be thus ascertained and settled, which was executed, and the line accordingly run and marked on a plat by the surveyor, in their presence, as the boundary, is conclusive in an action of ejectment, after a corresponding possession of 20 years by the parties, and those claiming under them respectively; and such an agreement is not within the statute of frauds, as being a contract for the sale of lands, or any interest in, or concerning them. *Boyd v. Graves*, 4 Wheat. 513. 517.

27. E. B. C., having an interest in a cargo *at sea*, agreed with J. W. for the sale of it, and J. W. signed the following agreement in writing: "J. W. agrees to purchase the share of E. B. C. in the cargo of the ship Aristides, W. P. C. supercargo, say at 2,522 dollars 83 cents, at fifteen per cent. advance on said amount, payable at five months from this date, and to give a note or notes for the same, with an approved endorser." In compliance with this agreement, J. W. gave his notes for the sum mentioned, and in an action upon the notes, the want of a legal consideration under the statute of frauds being set up as a defence, on the ground of the *defect of mutuality* in the written contract; the Court below left it to the jury to infer from the evidence an *actual performance* of the agreement. Verdict for the plaintiff, and judgment thereon. Judgment affirmed by this Court. *Weightman v. Caldwell*, 4 Wheat. 85.

## GUARANTIE.

- I. *What constitutes a garantie.*
- II. *Construction of a garantie.*
- III. *Jurisdiction of Courts of law or equity in cases of garantie.*
- IV. *Effects of a garantie.*
- V. *Fraudulent misrepresentation of the credit of a third person.*

## GUARANTIE I.

*What constitutes a garantie.*

1. The following letter, "Alexandria, 28th November, 1800.

" Mr. James M'Pherson,

" Dear Sir,

" We will become your security for one hundred and thirty barrels of corn, payable in twelve months.

(Signed) LAWRASON & SMORT."

will support an action of assumpsit against L. & S., by any person who, upon the faith of the letter, gives credit to J. M. for the corn. *Lawrason v. Mason, 3 Cranch, 492.*

2. A letter of credit addressed by mistake to *John* and *JOSEPH N.*, and delivered to *John* and *GEREMIAH N.*, will not support an action by *John* and *Jeremiah N.* for goods furnished by them to the bearer upon the faith of the letter of credit. *Grant v. Naylor, 4 Cranch, 224. 234.*

3. In such a case, the letter itself is not a written contract between the writer and *John* and *Jeremiah N.*, the persons to whom it was delivered. To admit parol proof to make it such a contract, would be going farther than Courts have ever gone, where the writing is itself the contract, not evidence of a contract.

and where no pre-existing obligation bound the party to enter into it. *Grant v. Naylor*, 4 *Cranch*, 224. 234.

4. The above was not a case of ambiguity. It was not an *ambiguity patent*, for the face of the letter can excite no doubt. It was not a *latent ambiguity*, for there were not in fact two firms of the name of John and Joseph N., to either of which the letter might have been delivered. *Ib.*

5. It was not a case of fraud. And if it was, a Court of Chancery would probably be the tribunal which would, if any could, afford redress. *Ib.*

6. If it was a case of mistake, it was a mistake of the writer only, not of him by whom the goods were advanced, and who claimed the benefit of the promise. *Ib.*

7. Where N. R. brought a suit against C., as surviving partner of C. & N., to recover from him the amount of sundry bills of exchange drawn by J. R. for the use of R. M. & Co., whose agent J. R. was, and endorsed by the plaintiff N. R., upon the faith of the two following letters written to him by the defendants, C. & N., viz.: "Our friends, Messrs. R. M. & Co., merchants in New-York, having determined to enter largely into the purchase of rice, and other articles of your produce in Charleston, but being entire strangers there, they have applied to us for letters of introduction to our friend. In consequence of which, we do ourselves the pleasure of introducing them to your correspondence, as a house on whose integrity and punctuality the utmost dependence may be placed; they will write you the nature of their intentions, and you may be assured of their complying fully with any contract or engagements they may enter into with you. The friendship we have for these gentlemen induces us to wish you will render them every service in your power; at the same time, we flatter ourselves the correspondence will prove a mutual benefit." "We wrote you yesterday a letter of recommendation in favour of Messrs. R. M. & Co. We have now to request that you will render them every assistance in your power," &c. *Held*, that these letters were not letters of credit, and did not constitute a *guarantie*, and that the plaintiff, N. R., was not

entitled to recover the amount of the bills endorsed by him, as alleged, on the faith of the letters from C. and N. *Grant v. Naylor, 4 Cranch, 224. 234.*

## GUARANTIE II.

*Construction of a guarantee.*

8. The law will not subject a man having no interest in the transaction to pay the debt of another, unless his undertaking manifests a clear intention to bind himself for that debt. *Russell v. Clark's executors, 7 Cranch, 69, 70.*

9. Words of doubtful import ought not to receive such a construction as to make the party using them liable for the debt of another person. *Ib.*

10. It is the duty of the individual who contracts with one man on the credit of another, not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume. *Ib.*

11. B., a merchant in New-York, wrote to L., a merchant in New-Orleans, on the 9th of January, 1806, mentioning that a ship belonging to T. & Son, of Portland, was ordered to New-Orleans for freight, and requesting L. to procure a freight for her, and purchase and put on board of her five hundred bales of cotton on the owners' account; "for the payment of all shipments on owners' account, thy bills on T. & Son, of Portland, or me, 60 days sight, shall meet due honour." On the 13th of February, B. again wrote to L., reiterating the former request, and enclosing a letter from T. & Son to L. containing their instructions to L., with whom they afterwards continued to correspond, adding, "thy bills on me for their account, for cotton they order shipped by the Mac, shall meet with due honour." On the 24th of July, 1806, B. again wrote to L. on the same subject, saying, "the owners wish her loaded on their own account, for the payment of which, thy bills on me shall meet with due honour at 60 day's sight." L. proceeded to purchase and ship

the cotton, and drew several bills on B., which were paid. He, afterwards, drew two bills on T. & Son, payable in New-York, which were protested for non-payment, they having, in the mean time, failed; and about two years afterwards, drew bills on B. for the balance due, including the two protested bills, damages, and interest.

*Held*, that the letters of the 13th of February, and 24th of July, contained no revocation of the undertaking in the letter of the 9th of January; that although the bills on T. & Son were not drawn according to B.'s assumption, this could only affect the right of L. to recover the damages paid by him on the return of the bills, but that L. had still a right to recover on the original garantie of the debt.

It was also *held*, that L., by making his election to draw upon T. & Son, in the first instance, did not, thereby, preclude himself from resorting to B., whose undertaking was, in effect, a promise to furnish the funds necessary to carry into execution the adventure. Also, *held*, that L. had a right to recover from B. the commissions, disbursements, and other charges of the transaction. *Lanusse v. Barker*, 3 Wheat. 101. 142.

### GUARANTIE III.

#### *Jurisdiction of Courts of law or equity in cases of garantie.*

12. The construction of a letter of credit or garantie is precisely the same in a Court of Equity as in a Court of Law, and any explanatory fact which could be admitted in the one Court, will be received in the other. *Russell v. Clark's executors*, 7 Cranch, 69. 89.

13. On the question of fraudulently misrepresenting the credit of a third person, the remedy at law is also complete, and in no case will a Court of Equity afford relief for an injury sustained by the fraud of a person who is no party to a contract induced by that fraud. *Ib.*

14. Where the only ground of equitable jurisdiction, in a case

of **guarantie** or **fraudulent misrepresentation**, is the discovery of facts solely within the knowledge of the defendant, and the defendant, by his answer, discloses no such facts ; and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the plaintiff will be dismissed from a Court of Equity, and permitted to assert his rights at law. *Russell v. Clark's executors*, 7 *Cranch*, 69. 89.

## GUARANTIE IV.

*Effects of a guarantie.*

15. It is the duty of a party who gives credit to another, upon the responsibility or undertaking of a third person, immediately to give notice to the latter, of the extent of his engagements. *Russel v. Clarke's executors*, 7 *Cranch*, 69. 92.

16. Where N. R. had endorsed the bills of R. M. & Co. upon the faith of a letter of credit or **guarantie** written by J. & W. R., and the principal debtors, R. M. & Co., and the guarantees J. & W. R., having all become insolvent ; R. M. & Co. made an assignment in trust, among other things, "to pay to J. & W. R. the amount that shall be recovered *and paid* from them to N. R." &c. "upon account of a letter of credit," &c. "and for which the said N. R. hath recovered a judgment against the said J. & W. R." No part of this judgment had ever been paid, and J. & W. R. being insolvent, the Court, though with some hesitation, felt constrained to decide, that, under the terms of the trust, N. R. claiming through J. & W. R., could not, under the then present state of things, demand its execution directly to himself. *Russell v. Clark's executors*, 7 *Cranch*, 69. 94.

17. But it is settled in this Court, that the person for whose benefit a trust is created, who is to be the ultimate receiver of money, may sustain a suit in equity to have it paid directly to himself. *Ib.*

18. Therefore, where, in the same case, the principal debtors,

R. M. & Co., had made another assignment in trust, among other things, "to pay to J. & W. R. all such moneys as they shall be liable to pay, as guarantees as aforesaid, to N. R., upon bills," &c. reciting the bills which N. R. had endorsed: *Held*, that the trust being to pay the guarantees a sum they were liable to pay to N. R., and being created in such terms that the money was certainly payable to them, it should be decreed to be paid directly to N. R. *Russell v. Clark's executors*, 7 *Cranch*, 69. 94.

19. A Court of Equity would not in such a case decree a payment to the guarantees, without security, that the debt for which they had become responsible should be paid. *Ib.*

20. But if the present circumstances of the trust be not sufficiently before the Court to enable it to decide with certainty whether a prior trust, which had been created by the deed of assignment, had been satisfied, or its objects otherwise so secured as that the trust fund might be applied to pay the debt guaranteed, the Court will not decree its payment.

21. A person, who, upon receiving an assignment of a share of property as security for a debt, agrees to comply with a contract of indemnity or garantie made by the assignor with a joint owner of the property, is bound to fulfil that contract, although it exceed in amount the value of the share of the property transferred to him.

Thus, where G. & B., merchants in this country, wrote the following letter to S. & Co., merchants abroad: "By the recommendation of our mutual friend, J. I. C., we are induced to make an acquaintance with your house, and we have accordingly recommended Mr. E. C., supercargo of the ship A., (of which he, together with Mr. J. C. N. and ourselves, are owners,) to call on you for the necessary aid he may require while in your city," &c. "We shall consider ourselves responsible for all contracts which Mr. E. C. may make in the business of this ship, and anticipate the pleasure of your being well satisfied with his strict fulfilment of them," &c. J. I. C. afterwards wrote to E. C., and after informing him of the failure of G. & B.,

and stating that they had conveyed to him two thirds of the ship A., and five sixths of two thirds of the cargo, added : " With respect to the ship, notwithstanding I have a bill of sale of two thirds, I shall view you (if you return here with her) as the owner of such proportion as agreed upon between you and them," &c. &c. "*and G. & B.'s contract with you shall, in every respect, be fully complied with, the same as it would have been done with them, had they continued owners.*" E. C., while abroad, in order to procure a cargo for the ship, had obtained credit with S. & Co., to whom the above letter of garantie was addressed, upon the hypothecation of the ship. *Held*, that the responsibility of G. & B. "for all contracts Mr. E. C. might make in the business of the ship," was as much a part of their engagement with him, as the agreement that he should be interested in the ship, and that J. I. C. was bound by his letter to pay to E. C. that part of the debt contracted abroad, on account of the ship and cargo, that G. & B. had agreed to be responsible for. *Clark's executors v. Carrington*, 7 Cranch, 300. 322.

## GUARANTIE V.

*Fraudulent misrepresentation of the credit of a third person.*

22. A fraudulent misrepresentation of the commercial credit of third persons, will subject the person making it to the damages sustained by the party who confides in such misrepresentation. *Russell v. Clark's executors*, 7 Cranch, 69. 92.

23. But though the representation made by the person sought to be charged was, at the time, untrue ; yet if he was ignorant of it, and, so far as appears by the evidence, believed that it was true, he is not responsible for the loss sustained by the other party in trusting to the representation. *Ib.*

24. When one commercial man speaks of another in extensive business, he must be presumed to speak from that knowledge only which is given by reputation. He must be supposed to speak of the credit, not of the actual known funds of the person

he recommends ; of his apparent, not of his real solidity. *Russell v. Clark's executors, 7 Cranch, 69. 92.*

25. In such a case, it is incautious and indiscreet to use terms which imply absolute and positive knowledge ; and it may, perhaps, be admitted, that fraud may be presumed on slighter evidence than would be required in a case where a letter was written with more circumspection. *Ib.*

26. Yet, even in such a case, where the communication is honestly made, and the party making it has no interest in the transaction, he is not responsible for its actual verity. *Ib.*

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## INFANCY.

1. Infancy is a bar to an action, *ex contractu*, by the owner of a cargo against his agent, the supercargo, for a breach of orders ; but not to an action of *trover* for the conversion of the goods. *Vasse v. Smith, 6 Cranch, 226. 230.*

2. But infancy may be given in evidence in an action of *trover*, upon the plea of not guilty ; not as a bar, but to show the nature of the act which is supposed to be a conversion. *Ib.*

3. An infant may be made liable in *trover*, although the goods converted be in his possession in virtue of a previous contract. *Ib.*

## INSURANCE.

- I. *Seaworthiness, and competency of the ship to perform the voyage.*
- II. *Risks or perils insured against : (A) What risks are within the policy. (B) What risks are excluded by the common memorandum. (C) Duration of risk.*
- III. *Policy : (A) Party effecting the policy, and description of the person and interest of the insured. (B) Mode of effecting, cancelling, and altering, and of correcting mistakes in, the policy. (C) Description of the voyage. (D) Valued or open policy. General construction of the policy.*
- IV. *Warranty : (A) Warranty of neutrality. (B) Warranty against illicit and contraband trade.*
- V. *Representation and concealment.*
- VI. *Deviation : (A) What is a deviation, and when actual or intended. (B) What will justify a deviation.*
- VII. *Loss : (A) By capture, or arrest and detention. (B) By barratry.*
- VIII. *Abandonment : (A) Upon capture or arrest. (B) When and how the abandonment must be made. (C) Effect of an abandonment.*

## INSURANCE I.

*Seaworthiness, and competency of the ship to perform the voyage.*

1. Where a policy upon a vessel contains a clause, "that if the vessel, after a regular survey, shall be condemned for being unsound or rotten, the underwriters shall not be bound to pay the subscription on this policy :" a report of surveyors, that the vessel was unsound and rotten, but not referring to the com-

mencement of the voyage, is not sufficient to discharge the underwriters. *Marine Ins. Co. of Alexandria v. Wilson*, 3 Cranch, 187.

2. *Quære*, Whether, in such a case, the report, even if it related to the commencement of the voyage, would be conclusive, or whether parol evidence might be admitted? *Ib.*

## INSURANCE II.

*Risks or perils insured against: (A) What risks are within the policy. (B) What risks are excluded by the common memorandum. (C) Duration of risk.*

### (A) *What risks are within the policy.*

3. Insurance on "the brig Richard, at and from Tobago, to one or more ports of the West Indies, and at and from thence to Norfolk." The following clause was inserted in the body of the policy: "This insurance is declared to be made against all risks, *blockaded ports and Hispaniola excepted.*" And at the foot of the policy was the following memorandum: "Warranted by the assured free from any charge, damage, or loss, which may arise in consequence of the seizure or detention of the property for or on account of illicit or prohibited trade." The vessel sailed from Tobago for Curracoa, which was then blockaded in fact, but the blockade was not known at Tobago when the vessel sailed, nor was it known to the master until he was warned off by a British ship of war of the blockading squadron. The vessel then sailed for Norfolk, but on the voyage was captured by a French privateer, by whom the vessel was plundered to a considerable extent, and ordered to St. Domingo for adjudication. *Held*, that this risk did not come within the exception contained in the policy, and the vessel having sailed ignorantly for a blockaded port, was covered by the policy *Yeaton v. Fry*, 5 Cranch, 335 341.

4. The exception contained in the policy in the above case was not a *warranty*; the words being the words of the insurer,

and not of the insured, and taking a particular risk out of the policy, which, but for the exception, would be comprehended in the contract. *Yeaton v. Fry, 5 Cranch, 335.* 341.

5. Policies of insurance are generally the most informal instruments which are brought into courts of justice; and there are no instruments which are more liberally construed, in order to effect the real intention of the parties, if that intention can be clearly ascertained. *Ib.*

6. Thus, in the above policy, a few words were given, to which others must be subjoined in order to complete the sense, and give a full description of the risk against which the underwriters were unwilling to insure. *Ib.*

7. “*Hispaniola*” was a specified place, excluded, by consent, from the policy. Against the risks of such a voyage, whatever they might be, the underwriters would not insure. The insured had notice of this, and if he had sailed for *Hispaniola*, the voyage would have been entirely at his own risk. *Ib.*

8. But the same principle does not apply to the other exception of “*blockaded ports*.” They were excepted from the insurance by their character as blockaded ports, and it is the risk attending this character, which produced the exception. *Ib.*

9. The risk of a blockaded port, as a blockaded port, is the risk incurred by breaking the blockade. This is defined by public law. Sailing from Tobago for Curracoa, knowing Curracoa to be blockaded, would have incurred this risk; but sailing for that port, without such knowledge, did not incur it. *Ib.*

(B) *What risks are excluded by the common memorandum.*

10. Whatever may have been the motive for the introduction of the clause concerning *memorandum articles* into policies of insurance, which was done as early as the year 1749, and most probably with the intention of protecting insurers against losses arising solely from a deterioration of the article, by its own perishable quality; or whatever ambiguity may have once ex-

isted from the term *average* being used in different senses, that is as signifying a contribution to a general loss, and also a particular or partial injury falling on the subject insured, it is well understood at the present day, with respect to such articles, that underwriters are free from all partial losses of every kind which do not arise from a contribution towards a general average. *Biays v. Chesapeake Ins. Co.* 7 Cranch, 415. 418.

11. When only a part of a cargo consisting all of the same kind of memorandum articles is lost, in any way whatever, and the residue arrives in safety at its port of destination, the loss being a partial loss only, and not resulting from a general average, the insurers are not liable for it.

Thus, where the sum of 25,000 dollars was insured on 14,565 hides "warranted by the assured free from average, unless general;" and 3,280 hides were put on board of a lighter to be transported from a vessel to their port of destination, and the lighter in her passage to the shore was sunk, by which accident, 789 of the hides, of the value of 4,000 dollars, were totally lost, and the residue, to the number of 2,491, were fished up and saved, at the expense of 6,000 dollars, paid by the insured, to whom the hides were delivered, and sold on his account. *Held*, that the underwriters were not liable for the loss. *Ib.*

12. The underwriters are not liable for salvage upon *memorandum articles* under that clause of the policy which authorizes the insured to labour and travel for the preservation of the cargo, unless perhaps in a case where the salvage may have prevented an actual total loss of the cargo. *Ib.*

Thus, in the above case, it was held that the underwriters not being answerable for the principal loss, they were not answerable for the subsequent expenses which were incurred in preserving the property. *Ib.*

13. A technical total loss may arise from a mere deterioration of the cargo by any of the perils insured against, if the deterioration be ascertained at an intermediate port of necessity, short of the port of destination. *Marcadier v. Chesapeake Ins. Co.* 8 Cranch, 39. 47.

14. In such case, although the ship be in a capacity to perform the voyage, yet if the voyage be not worth pursuing, or the thing insured be so damaged as to be of little or no value, the insured has a right to abandon. *Mareadier v. Chesapeake Ins. Co.* 8 *Cranch*, 39. 47.

15. It has therefore been held, that if the cargo be damaged in the course of the voyage, and it appears that what has been saved is less in value than the amount of the freight, it is a clear case of a total loss. *Ib.*

16. It does not, however, appear, that the exact quantum of damage which shall authorize an abandonment as for a total loss, has ever become the direct subject of adjudication in the English Courts. *Ib.*

17. The celebrated treatise *Le Guidon*, c. 7. considers that a damage exceeding the moiety of the value of the thing insured, is sufficient to authorize an abandonment. *Ib.*

18. This rule has received some countenance from more recent elementary writers; and from its public convenience and certainty, has been adopted as the governing principle in some of the most respectable commercial States in the Union; and perhaps is now so generally established as not easily to be shaken. *Ib.*

19. But this rule has never been deemed to extend to a cargo consisting wholly of memorandum articles. *Ib.*

20. The legal effect of the memorandum is to protect the underwriter from all partial losses; and if a loss by deterioration, exceeding a moiety in value, would authorize an abandonment, the great object of the stipulation would be completely evaded. *Ib.*

21. It is therefore the settled doctrine, that nothing short of a total extinction, either physical or in value, of memorandum articles, at an intermediate port, would entitle the insured to turn the case into a total loss, where the voyage is capable of being performed. *Ib.*

22. And, perhaps, even as to an extinction in value, where the commodity specifically remains, it may yet be deemed not

quite settled, whether, under the like circumstances, it would authorize an abandonment for a total loss. *Marcadier v. Chesapeake Ins. Co.* 8 Cranch, 39. 47.

23. The underwriter is, in all cases of deterioration, entitled to an exemption from partial losses on the memorandum articles; and in order to effectuate this right, it is necessary, where a technical total loss is sought to be maintained upon the mere ground of deterioration of the cargo, at an intermediate port, to a moiety of its value, to exclude from that estimate all deterioration of the memorandum articles. *Ib.*

24. In the case, therefore, of a cargo of a mixed character, embracing articles of both descriptions, some within and others without the purview of the memorandum, no abandonment, for mere deterioration in value during the voyage, can be valid, unless the damage on the non-memorandum articles exceeds a moiety of the value of the whole cargo, including the memorandum articles. *Ib.*

25. A total loss, for which only the insurer on memorandum articles is liable, can never happen, where the cargo, or any part of it, is sent by the insured, and reaches the original port of its destination.

Thus, where the ship being cast on shore near the port of destination, the agent of the insured employed persons to unlade as much of the cargo (of corn) as could be saved, and nearly one half was landed, dried, and sent on to the port of destination, and sold by the consignees at about one quarter the price of sound corn, leaving a very inconsiderable sum for the owner, after paying the expenses; this was held not to be a total loss, and the insurer was held not to be liable. *Morean v. The United States Ins. Co.* 1 Wheat. 219. 221.

(C) *Duration of the risk.*

26. Insurance at and from an Island, such as those of the West-Indies, generally, protects the vessel while coasting from port to port of the island for the purpose of the voyage insured.

Thus, where a ship was insured at and from New-York to Barbadoes, and at and from thence to the island of Trinidad, and at and from Trinidad back to New-York; and having arrived at the Port of Spain, in the island of Trinidad, remained there some time, and then sailed under a special license from the proper authorities, for Fort Hyslop, another port in the island, for the purpose of procuring and taking in a part of her return cargo, and with a view of returning to the Port of Spain, that being the only port in the island of Trinidad at which vessels arriving from other places were permitted to enter, or from which those destined on foreign voyages were permitted to clear; and was lost on her voyage to Fort Hyslop, by the dangers of the seas: *Held*, that the loss was within the policy. *Dickey v. Baltimore Ins. Co.* 7 *Cranch*, 327.

27. The voyage is terminated when the vessel arrives at her port of destination, and has been moored there in safety for twenty-four hours. *Gracie v. Marine Ins. Co.* 8 *Cranch*, 75. 82.

28. But the termination of the voyage, as to the ship, does not necessarily terminate the risk on the goods. *Ib.*

29. The duration of the risk on the goods, beyond the termination of the voyage, depends on the intention of the parties, and this intention must be found in their contract.

Thus, where insurance was made on cargo, at and "from Baltimore to Leghorn," "beginning the adventure on the said lawful goods and merchandizes from and immediately following the lading thereof on board of the said vessel at Baltimore aforesaid, and so shall continue and endure until the said goods and merchandizes shall be safely landed at Leghorn aforesaid;" *Held*, that the underwriters were discharged by the goods being landed at the Lazaretto erected for the performance of quarantine on the shore of the port about half a mile from the city, such being the known law of the place and established usage of trade. *Ib.*

30. The word "Leghorn," as used in the above policy, means not the city, but the port of that name. *Ib.*

31. The risk, in this case, continued until the goods were safely landed, although the voyage, as to the ship, might be terminated previous to their landing. *Gracie v. Marine Ins. Co.* 8 Cranch, 75. 82.

32. In ordinary cases, where the government does not interfere between the parties, this risk would continue until the goods should be landed in safety at the usual place, and at the disposal of the consignee. *Ib.*

33. But in this case, the establishment of the Lazaretto and the laws of quarantine, at the port of Leghorn, being of ancient date, and of general notoriety, formed a usage of trade known to the parties, and controlling the contract. *Ib.*

### INSURANCE III.

*Policy.* (A) *Party effecting the policy, and description of the person and interest of the insured.* (B) *Mode of effecting, cancelling, and altering, and of correcting mistakes in, the policy.* (C) *Description of the voyage.* (D) *Valued or open policy.* *General construction of the policy.*

(A) *Party effecting the policy, and description of the person and interest of the insured.*

34. A policy in the name of one joint-owner, "as property may appear," (without the clause stating the insurance to be for the benefit of all concerned,) does not cover the interest of another joint-owner. *Graves v. Boston Marine Insurance Co.* 2 Cranch, 419. 431.

35. The interest of a co-partnership cannot be given in evidence on an averment of individual interest, nor an averment of the interest of a company be supported by a special contract relating in its terms to the interest of an individual. *Ib.*

36. The case of *Page v. Fry*, (2 Bos. & Pull. 240.) even if binding as an authority, is too imperfectly reported to overthrow the previously established doctrine, that an averment of

the interest of a company in an insurance, cannot be supported by evidence of a special contract relating in its terms to an individual only. *Graves v. Boston Marine Ins. Co.* 419. 431. 440.

(B) *Mode of effecting, cancelling, and altering, and of correcting mistakes in, the policy.*

37. If the insured make a proposition to the underwriters to cancel the policy, which proposition is rejected; and the underwriters afterwards assent to the proposition, but before information of such assent reaches the insured, they have notice of the loss of the vessel insured, such proposition and assent do not in law amount to an agreement to cancel the policy. *Head v. The Providence Ins. Co.* 2 Cranch, 127. 187.

38. Where the act, by which an insurance company was incorporated, provided, "that all policies of assurance, and other instruments, made and signed by the president of said company, or any other officer thereof, according to the ordinances, by-laws, and regulations of the said company, or of their board of directors, shall be good and effectual in law, to bind and oblige the said company to the performance thereof, in manner as set forth in the constitution of the said company," &c. Held, that a contract varying a policy, in order to become the act of the company, must be executed in the same manner with the policy itself. The force of a policy may, indeed, be terminated by actually cancelling it, but an agreement to cancel it must be executed in the same manner with the policy itself. *Ib.*

39. Without ascribing to the company in question all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. *Ib.*

40. A Court of Equity will not correct an alleged mistake in a policy of insurance, unless the evidence of the knowledge by the underwriters of the intention of the insured, at the time of

making the policy, be very clear and free from doubt. *Head v. The Providence Ins. Co.* 2 Cranch, 127. 167.

(C) *Description of the voyage.*

41. Upon a policy "from Baltimore to Laguira, with liberty of one other neighbouring port, and at and from them, or either of them, back to Baltimore;" held, that the port of Amsterdam, in the island of Curracoa, was a neighbouring port within the policy, the distance between the two places being inconsiderable, and it not being stipulated that the neighbouring port should be under the same government. *Maryland Ins. Co. v. Woods,* 6 Cranch, 29. 47.

(D) *Valued or open policy. General construction of the policy.*

42. In an action upon a valued policy, it is not competent for the underwriters to give parol evidence that the real value of the thing insured is different from that stated in the policy. *Marine Ins. Co. v. Hodgson,* 6 Cranch, 206. 220.

43. When a cargo is insured by different policies, in some of which the rate of exchange is fixed at which the prime cost of the cargo shall be valued; in ascertaining the amount of the interest of the insured, upon settlement of those policies in which the rate of exchange is fixed, the whole cargo is to be valued at that rate of exchange, without regard to the rate of exchange by which the value may have been ascertained in the other policies. *Pleasants v. Maryland Ins. Co.* 8 Cranch, 55.

INSURANCE IV.

*Warranty.* (A) *Warranty of neutrality.* (B) *Warranty against illicit and contraband trade.*

(A) *Warranty of neutrality.*

44. A ship warranted to be American property, (while the United States are neutral,) is impliedly warranted to conduct herself

during the voyage as a neutral; and an attempt to enter a blockaded port, knowing it to be blockaded, forfeits that character, and is a breach of the warranty. *Fitzsimmons v. Newport Ins. Co.* 4 Cranch, 185. 198.

45. But a sentence of a Prize Court, declaring "the said brig to have cleared out for Cadiz, a port actually blockaded by the arms of our sovereign lord the king, and that the master of said brig persisted in his intention of entering that port after warning from the blockading force not to do so, is a direct breach and violation of the blockade thereby notified,"—is not conclusive evidence of a breach of the warranty of neutrality. Persisting in an intention to enter a blockaded port after warning, is not attempting to enter it. *Ib.*

46. Sailing for a blockaded port, knowing it to be blockaded, has been, in some English cases, construed into an intention to enter that port, and has therefore been adjudged a breach of the blockade from the departure of the vessel. In such cases, the fact of sailing is coupled with the intention, and the sentence of condemnation was founded upon an actual breach of blockade. The cause assigned for condemnation would be a justifiable cause, and it would be for the foreign Court alone to determine whether the testimony supported the allegation that the blockade was broken. Had the above sentence averred that the brig had *broken the blockade*, or had attempted to enter the port of Cadiz after warning from the blockading force, the cause of condemnation would have been justifiable, and the assured could not, without controverting the conclusiveness of the sentence, have entered into any inquiry respecting the conduct of the vessel. *Ib.*

47. A warranty of neutrality is forfeited by a breach of blockade. *Croudson v. Leonard*, 4 Cranch, 434.

48. The sentence of a foreign Prize Court, condemning a vessel for attempting to break a blockade, is conclusive evidence, in an action on the policy of insurance, containing a warranty of neutral property. *Ib.*

49. The doctrine of the conclusiveness of the sentences of

foreign Prize Courts is coeval with the species of contract to which it is applied. It was the law of policies of insurance at the time when they were considered in England as contracts proper for the Admiralty jurisdiction, and at the time when they were submitted to the Court of Policies established in the reign of Elizabeth. *Croudson v. Leonard*, 4 *Cranch*, 434. *Per Johnson J.*

50. The doctrine of the conclusiveness of foreign prize sentences is founded upon the principle that all the world are parties in an admiralty cause. The insured is emphatically a party; the master is his immediate agent, and is also bound to act for the benefit of all concerned; so that, in this respect, he also represents the insurer. *Ib. Per Washington, J.*

51. A policy of insurance for "G. F. S. and others of Richmond, as well in his own name as for and in the name and names of all and every other person and persons to whom the same did, might, or should appertain, in part or in all,"—and containing no warranty of neutrality, covers belligerent as well as neutral property. *Hodgson v. Marine Ins. Co.* 5 *Cranch*, 100. 109.

52. Some of the parties insured being described as *of Richmond*, (a place in the United States, then neutral,) does not necessarily imply that they all resided there; and even if it were so, an express warranty of neutrality is necessary, if it be designed to run only a neutral risk. *Ib.*

53. In an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign Prize Court, upon the ground of a breach of blockade, is not conclusive evidence of a violation of the warranty. *Marine Ins. Co. v. Woods*, 6 *Cranch*, 29. 44.

54. *Quære*, Whether a breach of blockade, by a vessel not warranted neutral, would discharge the underwriters? *Ib.*

55. The contract of insurance is very loosely drawn, and a settled construction, different from the natural import of the words, is given by the commercial world, to many of its stipu-

lations, which construction has been sustained by the decisions of Courts. One of these is on the warranty that the vessel is neutral property. *Marine Ins. Co. v. Woods*, 5 Cranch, 29. 44.

56. It seems, that without a warranty of neutrality, the attempt of a neutral vessel to enter a blockaded port might be considered as discharging the underwriters. But no such decision has ever been made, nor is the principle asserted in any of the elementary writers. *Ib.*

57. On the contrary, the judgments in favour of the underwriters in such cases have been uniformly founded on the breach of the warranty of neutrality, which, though in terms extended only to the property, has been carried by construction to the conduct of the vessel. *Ib.*

58. This being the construction put by parties, and by Courts, on the warranty of neutrality, the reservation of the right of giving proof in the United States, which, in direct terms, refers to the whole warranty, must be considered as intended by the parties to be co-extensive with the warranty itself; and, as the conduct of the vessel is, in legal construction, comprehended in the warranty of her neutrality, the conduct of the vessel will, in legal construction, be comprehended in the reservation of a right to make proof in the United States. *Ib.*

59. If the interest of one joint owner of a cargo be insured, and if that interest be *bona fide* neutral, it is no breach of the warranty of neutrality if the other joint owner, whose interest is not insured, be a belligerent. *Livingston v. Maryland Ins. Co.* 6 Cranch, 274. 278.

60. The assured in such a case are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral. *Ib.*

61. In general, concealment of papers amounts to a breach of the warranty of neutrality. *Livingston & Gilchrist v. Maryland Ins. Co.* 7 Cranch, 508. 536.

62. But when the underwriters know, or by the usage and course of the trade insured, ought to know, that certain papers must be on board for the purpose of protection in one event,

which in another might endanger the property, they tacitly consent that the papers shall be so used as to protect the property.

Thus, where, during war between Great Britain and Spain, the United States being neutral, by the usage of the trade to Peru from any foreign port, it was necessary for the ship to have on board Spanish papers, in order to give a Spanish character to the property in Spanish ports, the concealment of those papers from a British cruiser was held to be no breach of the warranty of neutrality. *Livingston & Gilchrist v. Maryland Ins. Co.* 7 Cranch, 506. 536.

63. If a policy insures against "unlawful arrests, restraints, and detainments of all kings, princes," &c. the qualification "unlawful," extends in its operation as well to "restraints and detainments," as "to arrests;" and in such case a detainment by a force lawfully blockading a port, is a lawful arrest and restraint by the blockading squadron, and is not a peril insured against by a policy containing a warranty of neutrality. *McCall v. Marine Ins. Co.* 8 Cranch, 59. 65.

(B) *Warranty against illicit and contraband trade.*

64. Insurance, by two policies, upon the cargo, at and from New-York to one or two Portuguese ports on the coast of Brazil, and at and from thence back to New-York. At the foot of one of the policies was the following clause: "The insurers are not liable for seizure by the Portuguese for illicit trade;" and in the body of the other, was inserted the following: "N. B. The insurers do not take the risk of illicit trade with the Portuguese." Held, that the exception in both clauses was substantially the same, and if the vessel and cargo were seized and condemned by the Portuguese government for an attempt to trade illicitly, the underwriters were not liable for the loss. *Church v. Hubbard*, 2 Cranch, 187. 236.

65. No seizure not justifiable under the laws and regulations of Portugal for the restriction of foreign commerce with its colonies, would come within such an exception; but every seizure

which is justifiable by these laws and regulations, is within it. *Church v. Hubbard, 2 Cranch, 187. 236.*

66. The right of a nation to seize foreign vessels attempting an illicit trade, is not confined to its own territorial limits. *Ib.*

### INSURANCE V.

#### *Representation and concealment.*

67. In order to avoid a policy for a misrepresentation, it must be a misrepresentation in which the matter disclosed or concealed is material to the risk of the voyage; in which it affects the risk so as to render it different from the one understood at the time, and on which the premium was calculated. *Hodgson v. Marine Ins. Co. 5 Cranch, 100. 109.*

68. It is not on the doctrine of *seaworthiness*, that a misrepresentation is held to vitiate the policy, because the insured is always supposed to guarantee the sufficiency of his vessel to perform the voyage insured. *Ib. Per Johnson, J.*

69. Nor is it an evident and necessary increase of the risk; but it is presenting such false lights to the insurer, as to induce him to enter into a contract materially different from that which he supposes he is entering into. *Ib. Per Johnson, J.*

70. If the assured represent the whole cargo to be neutral, when it is not, or if he conceal the interest of a belligerent when it ought to have been disclosed, the effect of the misrepresentation or concealment on the policy depends on its materiality to the risk; which must be decided by a jury under the direction of the Court. It is a mixed question of law and fact, on which the Court is bound to direct the jury as to the law. *Livingston v. Maryland Ins. Co. 6 Cranch, 274. 278.*

71. These words in a letter from the assured to his agent ordering the insurance: "You have already had a description of the ship from Messrs. C. & D., the agents of Mr. J., who is the owner, and which I presume is correct," do not amount to a warranty or a representation of what was contained in the letter of

Messrs. C. & D. *Livingston v. Maryland Ins. Co.* 6 Cranch, 274. 278.

72. They do not account to a *warranty*, because they are not introduced into the policy ; nor to a *representation*, because they only express the *belief* or *expectation* of the assured. *Ib.*

73. If a vessel take on board papers, which are necessary to carry on the voyage insured, according to the usage and course of the trade, but which increase the risk of capture, the non-disclosure of the fact that they would be on board will not vitiate the policy. *Ib.*

74. But if it is not the regular usage of the trade to take such papers on board, and they are material to the risk, the non-disclosure of the fact will vitiate the policy. *Ib.*

75. The operation of any concealment on the policy depends on its materiality to the risk ; and this materiality is a subject for the consideration of the jury. *Maryland Ins. Co. v. Ruden's Administratrix*, 6 Cranch, 338, 339.

76. Upon an insurance on a valued policy, if a misrepresentation of age and tonnage of the vessel, whereby the underwriters are induced to agree to a high valuation, be a defence, it is at law, and not in equity ; unless the underwriters be prevented from using it at law by the act of the insured, or by any positive rule which disabled them from doing so. *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332. 238.

77. To constitute a representation, there must be language used equivalent to an averment of a particular fact. If it be untrue, its materiality to the risk must determine its influence on the policy. A false representation, though no breach of the contract, if material, avoids the policy on the ground of fraud, or because the insurer has been misled by it. *Livingston & Gilchrist v. Maryland Ins. Co.* 7 Cranch, 506. 535.

78. To constitute a representation, there must be an affirmation or denial of some fact, or an allegation which will plainly lead the mind to the same conclusion. If the expressions are ambiguous, the insurer ought to ask an explanation, and not substitute his own conjectures for an alleged representation. *Ib.*

79. It is a general rule, that a paper, which expressly refers to another paper within the power of the party, gives notice of the contents of that other paper. *Livingston & Gilchrist v. Maryland Ins. Co.* 7 Cranch, 506. 538.

80. Therefore, if the letter ordering the insurance and submitted to the underwriters, refer to another letter previously laid before them, which letter contained information that the vessel had permission to trade to the Spanish colonies, the underwriters are bound to notice that fact, and to know that the vessel would take all the papers necessary to legalize the voyage. *Ib.*

## INSURANCE VI.

*Deviation:* (A) *What is a deviation, and when actual or intended.* (B) *What will justify a deviation.*

(A) *What is a deviation, and when actual or intended.*

81. A detention at sea to save a vessel in distress, is such a deviation as discharges the underwriters. *Mason v. The Blaireau,* 2 Cranch, 240. 268.

82. An intended deviation, not actually carried into effect, will not vitiate a policy, nor exempt the insurers from a loss happening before the vessel arrives at the dividing point. *Marine Ins. Co. v. Tucker,* 3 Cranch, 357. 384.

83. If the ship sail from the port mentioned in the policy, with an intention to go to the port or ports also described therein ; a determination to call at an intermediate port, either with a view to land a cargo, for orders, or the like, is not such a change of the voyage as to prevent the policy from attaching, but is merely a case of deviation, if the intention be carried into execution, or be persisted in after the vessel has arrived at the dividing point, *Ib.*

84. The ordinary rule for ascertaining the identity of a voyage insured, is by adverting to the termini. When the termini

of a voyage are the same, an intention to touch at an intermediate port, though out of the direct course, and not mentioned in the policy, does not constitute a different voyage. *Marine Ins. Co. v. Tucker*, 3 Cranch, 357. 384.

85. If a vessel be insured "at and from Kingston, in Jamaica, to Alexandria," and take in a cargo at Kingston for Baltimore and Alexandria, and sails with the intention to go first to Baltimore, and from thence to Alexandria, and, before she arrives at the dividing point, is captured; it is a case of intended deviation only, and not a case of non-inception of the voyage insured. *Ib.*

86. Incorrect expressions are attributed to Lord Mansfield, in *Wooldridge v. Boydell*, (Doug. 16.) who is there said to have expressed an opinion, that "if a ship be insured from A. to B., and before her departure the insured determine that she shall call at C., which is out of the usual course of the voyage from A. to B., this is rather a different voyage than an intended deviation." This opinion was not material to the decision of that case, and is expressly contradicted by the case of *Kewley v. Ryan*, (2 H. Bl. 343.) and by *Henshaw v. Marine Ins. Co.* (2 Caines' Rep. 274.) We can only vindicate the accuracy of his lordship's opinion in the case which he states, by supposing that his mind was intent upon those cases of intended deviation, in which a *suppressio veri*, or necessary increase of risk, are the grounds of decision. *Ib. Per Johnson, J.*

87. The reasons assigned for the decision of *Way v. Modigliani*, (2 T. R. 30.) give that case the appearance of an authority unsavourable to the doctrine which distinguishes between an intended deviation and a non-inception of the voyage insured. But the weight of it is greatly impugned, if not destroyed, by the following considerations: 1st. That as there was a clear deviation, it was unnecessary to decide the other point that the policy did not attach. 2d. That this latter opinion seems to have been entertained only by one of the Court, and even this judge relied very much upon the fact, that the vessel *sailed to the Banks*. 3d. From what was said in *Kewley v. Ryan*, (2 H.

*Bl. 343.)* it would appear that the ship, when she left Newfoundland, did not sail for England, and of course, the voyage insured never was commenced. *Ib. 389. Per Washington, J.*

88. If a vessel sail to a port within the policy, with intent to go to a port not within the policy in case the former should be blockaded, this is not a deviation. *Maryland Ins. Co. v. Woods, 6 Cranch, 29. 47*

89. The discharge of underwriters from their liability, in case of taking on board an additional cargo, not authorized by the policy, depends, not upon any supposed increase of risk, but wholly on the departure of the insured from the terms of the contract of insurance. *Maryland Ins. Co. v. Le Roy et al. 7 Cranch, 26. 30.*

90. The consequences of such violation of the contract are immaterial to its legal effect, as it is, *per se*, a discharge of the underwriters, and the law attaches no importance to the degree in cases of voluntary deviation. *Ib.*

91. Necessity alone can sanction a deviation in any case ; and that deviation must be strictly commensurate with the *vis major* producing it. *Ib.*

92. There is a distinction between the question of what acts are lawful to be done during the delay occasioned by a justifiable cause of deviation, and a case of voluntary departure from the stipulations of the policy. *Ib.*

93. In an action on a policy on the cargo of the ship John, for a certain voyage, "with liberty of touching at the Cape de Verds on her return passage, *for stock*, and to take in water." The order for the insurance was as follows : "At what rate will you insure 3,500 dollars upon freight of the ship John of New-York, valued at that sum, at and from New-York to Castle D'Elmina, on the Gold Coast of Africa, with liberty to touch at the Cape de Verd Islands for the purchase of stock, such as *hogs, goats, and poultry*, and taking in water? Also, 9,000 dollars on the American ship J., valued at this sum ; and 11,800 dollars on cargo by said ship, consisting of wine, rum, beef, geneva, dry goods, tobacco, molasses, &c. at and from New-York to five

ports on the coast of Africa, between Castle D'Elmina and Cape Lopez, including those ports, with liberty of trading and touching at all, or any of said ports, backwards and forwards, and at and from her last port on the coast to New-York, with liberty of touching at the Cape de Verds on her return voyage, *for stock, and to take in water,*" &c. The master, on the return voyage, touched at one of the Cape de Verd Islands, and received on board *four bullocks and four jackasses*, beside water and other provisions, and unstowed the dry goods, broke open two bales and took out 40 pieces of each for trade. *Held, that this was such a deviation as avoided the policy.* *Maryland Ins. Co. v. Le Roy et al.* 7 Cranch, 26. 30.

94. *Touching*, in its nautical sense, is the most restrictive word that can be adopted in such a case. *Ib.*

95. Construing the license *to touch for stock*, according to the subject matter, and in its necessary connection with the offer on the freight, it could mean no more than permission to provision the vessel with live stock, such as is usual on a voyage, and may be procured at the Cape de Verds. *Ib.*

96. *Quare, Whether any of the larger animals used for food were included in this policy?* *Ib.*

(B) *What will justify a deviation.*

97. If a vessel remain a greater length of time in a port than is necessary to complete the purposes for which she entered the port, it is a deviation which discharges the underwriters; but the length of time a vessel may wait for the purpose of taking in a cargo, does not depend on the usage of trade of that port, although the length of time frequently employed in selling one cargo and procuring another, may assist in proving, that a particular vessel has or has not practiced unnecessary delays. *Oliver v. Maryland Ins. Co.* 7 Cranch, 487. 489.

98. The danger which will justify a vessel in remaining in port a long time without discharging the underwriters, must be obvious and immediate, in reference to the situation of the ship

at the particular time. It must be such as is then directly applied to the interruption of the voyage, and imminent; not such as is merely distant, contingent and indefinite. *Oliver v. Maryland Ins. Co.* 7 *Cranch*, 487. 489.

99. If, according to the usage of trade, a vessel has a right to go from one port to another to collect her cargo, and she unnecessarily exhausts at one port the whole time necessary to complete her cargo, she cannot go to the other port without being guilty of such a deviation as will avoid the policy. *Ib.*

100. What will excuse a delay, apparently unreasonable, so as to repel the charge of a deviation on that account, is a question of law to be decided by the Court under all the circumstances of the particular case, and not by the jury. *Ib.* *Per Livingston and Story, J. J.*

101. Insurance on a vessel and freight, "at and from Teneriffe to the Havanna, and at and from thence to New-York, with liberty to stop at Matanzas," with a representation, that the vessel was "to stop at Matanzas to know if there were any men of war off the Havanna." The vessel sailed on the voyage insured, and put into Matanzas to avoid British cruisers, who were then off the Havanna, and were in the practice of capturing neutral vessels trading from one Spanish port to another. While at Matanzas she unladed her cargo, under an order from the Spanish authorities; and afterwards proceeded to Havanna, whence she sailed on her voyage for New-York, and was afterwards lost, by the perils of the seas. It was proved, that the stopping and delay at the Havanna was necessary to avoid capture, that no delay was occasioned by discharging the cargo, and that the risk was not increased, but diminished.

*Held*, that the order of the Spanish government was obtained under such circumstances as took from it the character of a *vis major* imposed upon the master, and was, therefore, no excuse for discharging the cargo; but that the stopping and delay at Matanzas were permitted by the policy, and that the unlading the cargo was not a deviation. This case distinguished from that of the *Maryland Ins. Co. v. Le Roy et al.* (7 *Cranch*, 26.)

by the circumstances, that in that case, articles were taken on board which encumbered the deck of the vessel, and which were not within the liberty reserved by the policy; the insured traded, and the delay was considerable and unnecessary; the risk, if not increased, might be, and certainly was, varied. *Hughes v. Union Ins. Co.* 3 Wheat. 159. 163.

## INSURANCE VII.

*Loss:* (A) *By capture, or arrest and detention.* (B) *By baratry.*

(A) *By capture, or arrest and detention.*

102. If the vessel be captured and recaptured, it depends upon the particular circumstances of the case, whether the loss shall be deemed *total* or *partial*. It is a question of law dependent upon the point of fact, whether, upon the whole evidence, the voyage was broken up, and not worth pursuing. *Marine Ins. Co. of Alexandria v. Tucker*, 3 Cranch, 359. 386. 391. 394.

103. The usage of trade may be proved by parol evidence, although such usage originated in a written law or edict of the government of the country where it prevails. And no acts, justifiable by the usage of trade, and done by the insured to avoid confiscation under the laws of the country where she is trading, will avoid the policy. *Livingston & Gilchrist v. Maryland Ins. Co.* 7 Cranch, 506. 539.

104. If the insured do any act which increases the risk of capture and detention according to the common practice of the belligerent, it may avoid the policy. It is not necessary that the risk thus increased should be the risk of rightful capture according to the law of nations. *Ib.*

105. A vessel, within a port blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril within that clause of the policy insuring against the "arrests, restraints, and detainments of kings," &c. for which the insurers are liable; and if the vessel so prevented

be a neutral, having on board a neutral cargo, laden before the institution of the blockade, the restraint is unlawful. *Oliver v. Union Ins. Co.* 3 Wheat. 183. 188.

106. The case of *Saloucci v. Johnson*, (Park. Ins. 79.) has been overruled, so far as it decided that a resistance to search did not justify a seizure; yet the principle recognised in that case, that an unlawful arrest at sea is to be considered as a detention of prisoners, has not been impugned. *Rhinelander v. Ins. Co. of Pennsylvania*, 4 Cranch, 43.

(B) *By barratry.*

107. Barratry is an act committed by the master or mariners of a ship, for some unlawful or fraudulent purpose, contrary to their duty to the owners, whereby the latter sustain an injury. *Murcadier v. Chesapeake Ins. Co.* 8 Cranch, 39. 49.

108. It follows, therefore, from the very terms of the definition, that it cannot be committed by a master who is owner for the voyage; because he cannot commit a fraud against himself. *Ib.*

109. But it may be committed against a person who is owner for the voyage, although he may not be the general owner of the ship. *Ib.*

110. A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship. *Ib.*

111. But where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character, or legal responsibility of ownership. Consequently, if the general owner be master of the vessel he cannot commit barratry.

Thus, where the general owner, who was also master of the ship for the voyage insured, by a charter party of affreightment

made with the owner of the goods insured, granted, and to freight let, to him, the ship, excepting and reserving her cabin for the use of the master and mate, and for the accommodation of passengers, and so much room in the hold as might be necessary for the mariners, and storage of water, wood, provisions, and cable, for the voyage insured ; and covenanted to man, victual, and navigate the ship at his own charge during the voyage, and to receive on board any shipment of goods, not contraband, which the insured should tender at the side of the ship, or within reach of her tackles, at the port where the voyage commenced, and to stow and secure the same, and to proceed therewith to the port where the voyage was to end, and there discharge the same. The passengers on board were to be at the joint expense of the parties, and the passage money was to be equally divided between them. The insured covenanted to pay the stipulated freight and demurrage. *Held*, that the ownership was not devested by the covenant of affreightment, and consequently, the master was incapable of committing barratry. *Marcadier v. Chesapeake Ins. Co.* 8 Cranch, 39. 49.

112. The insured cannot recover for a loss by barratry, unless the barratry produced the loss ; but it is immaterial whether the loss so produced occurred during the continuance of the barratry, or afterwards. *Swan v. Union Ins. Co.* 3 Wheat. 168. 170.

### INSURANCE VIII.

*Abandonment.* (A) *Upon capture or arrest.* (B) *When and how the abandonment must be made.* (C) *Effect of an abandonment.*

#### (A) *Upon capture or arrest.*

113. To constitute a right to abandon, there must have existed a total loss, occasioned by one of the perils insured against. *Rhinelander v. Ins. Co. of Pennsylvania*, 4 Cranch, 29. 42.

114. A total loss may be either *real* or *technical*. Where the loss is *real*, a controversy can only respect the fact ; but the cir-

circumstances which constitute a technical or legal total loss involve a question of law. *Rhinelander v. Ins. Co. of Pennsylvania*, 4 Cranch, 29. 42.

115. A capture by one belligerent from another, constitutes in the technical sense of the word, a total loss, and gives an immediate right to the insured to abandon to the insurers, although the vessel may afterwards be recaptured and restored. *Ib.*

116. An embargo or detention by a foreign friendly power constitutes a total loss, and warrants an immediate abandonment. *Ib.*

117. Where there is a complete capture at sea, of a neutral vessel, by a belligerent, who takes full possession of the vessel as prize, and continues that possession to the time of the abandonment, there exists, in point of law, a total loss, and the act of abandonment vests the right to the thing abandoned in the underwriters, and the amount of insurance in the assured. *Ib.*

118. The state of the loss, *at the time of the abandonment*, fixes the right of the parties to recover on an action afterwards brought; and the restitution and subsequent return of a vessel, captured as prize, does not deprive the assured of that right to resort to the underwriters for a total loss, which was given by the abandonment. *Ib.*

119. The right of the insured to abandon and recover for a total loss, depends upon the fact at the time of the offer to abandon, and not upon the state of the information received. *Marshall v. Delaware Ins. Co.* 4 Cranch, 202. 206.

120. The technical total loss arising from capture ceases with a final decree of restitution, although that decree may not have been executed at the time of the offer to abandon. *Ib.*

121. In delivering its opinion in the above case of *Rhinelander v. Ins. Co. of Pennsylvania*, the Court understood itself to require, that the continuance of the possession by the captors up to the time of the abandonment, or technical total loss incurred, notwithstanding the restitution, was necessary to justify a recovery as for a total loss. *Ib.*

122. A neutral vessel, while prosecuting the voyage insured,

was captured by a belligerent cruiser, and libelled as prize. On the 9th of July, 1806, a final sentence of restitution of the vessel and cargo was pronounced, and on the 19th of the same month, about 1 o'clock, P. M. restitution was actually made. On the 17th of July, the assured in New-York received information of the capture, and immediately instructed his agent in Philadelphia to abandon to the underwriters. In pursuance of these instructions, the offer to abandon was made on the morning of the 19th. *Held*, that the insured could not recover as for a total loss. *Marshall v. Delaware Ins. Co.* 4 *Cranch*, 202. 206.

123. A policy upon a ship is an insurance of the ship for the voyage, not an insurance on the ship *and* the voyage. The underwriters undertake for the ability of the ship to perform the voyage, and to bear any damage which she may sustain in making that voyage, not that she shall perform it at all events. *Alexander v. Baltimore Ins. Co.* 4 *Cranch*, 370. 373.

124. The loss of the voyage as to the cargo is not the loss of the voyage as to the ship. *Ib.*

125. If, in the case of a policy on the ship, at the time of the offer to abandon, the ship be in possession of the master, in good condition, and at full liberty to proceed on the voyage, the loss of the cargo will not authorize the owner of the ship to abandon and recover as for a total loss.

Thus, where an action was brought against the underwriters to recover the amount of a policy insuring the ship *John & Mary*, from Charleston to Port Republicain, and one other port in the Bile of Leogane. On the 2d of October, 1803, the ship, while prosecuting the voyage, was seized by a French privateer, and carried into the Port of Mole St. Nicholas, where the cargo was taken by M. De Noailles, the French commandant, for the use of the garrison. On the same day the master received a written engagement from M. De N. to pay for the cargo in coffee, after which the vessel was unladen. The master remained at the Mole, in expectation of receiving payment, until the 29th of October, when he sailed for Cape *Francais*, (out of the limits of the voyage insured,) with an order on that place for payment in

coffee. On the 4th of November, she was captured by a British squadron then blockading Cape Francais, and condemned as prize. The abandonment was made in December, on account of the capture by the French privateer. *Held*, that the ship owner could not recover as for a total loss of the vessel. *Alexander v. Baltimore Ins. Co.* 4 *Cranch*, 370. 373.

126. A policy was underwritten insuring the freight of the ship Venus on a voyage from Philadelphia to the Isle of France. The vessel sailed early in December, 1807, before the British orders in council of the preceding November, declaring the French ports in a state of blockade, were known in the United States. On the 16th of January, 1808, while prosecuting the voyage she met the British ship of war Wanderer, by whom she was arrested and detained until the 18th, when she was restored to the master, her papers being first endorsed, "Ship Venus warned off the 18th of January, 1808, by H. M. S. Wanderer, from proceeding to any port in the possession of His Majesty's enemies. E. M. Second Lieutenant." The master was verbally informed by an officer of the Wanderer, that the Isle of France was blockaded, and that the Venus would be a good prize, if she proceeded thither. The master returned to Philadelphia, where he was disabled from prosecuting his voyage by the embargo. The insured abandoned to the underwriters, considering the voyage as broken up by the arrest and detention by the British ship of war. *Held*, that these circumstances did not justify the master in returning to Philadelphia, nor authorize the abandonment. *King v. Delaware Ins. Co.* 6 *Cranch*, 71. 78. 80.

127. The British orders in council of November, 1807, did not extend to the direct trade between a neutral port and the colony of an enemy of Great Britain. *Ib.*

128. The Isle of France not being actually blockaded; the orders in council not prohibiting the voyage; and the vessel not being physically incapacitated from prosecuting it; there existed, in the above case, at the time the voyage was abandoned, neither in fact nor in law, the restraint or detention against which the underwriters insured. *Ib.*

129. The voyage having been broken up from fear, founded on misrepresentation, whether this might be justified under any circumstances or not, the circumstances of this case did not justify it. The vessel might have proceeded, and ought to have proceeded, until she could obtain farther information. *King v. Delaware Ins. Co.* 6 Cranch, 71. 79. 80.

130. *Quære*, Whether the underwriters would have been liable in this case; had the orders in council prohibited the trade to the Isle of France? *Ib.*

131. The questions, in the above case, whether the voyage was *broken up*, and whether the master was *justified* in returning, were questions of law, and the finding of the jury thereupon was not to be regarded by the Court. *Ib.*

(B) *When and how abandonment must be made.*

132. An abandonment, to be effectual, must be made in reasonable time: but what time is reasonable, is a question compounded of fact and law, which must be found by a jury under the direction of the Court. *Maryland Ins. Co. v. Ruden's administrator*, 6 Cranch, 338.

133. A special verdict which finds an abandonment, but does not find whether it was made in reasonable time, is defective. *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268. 273.

134. The right to abandon may be kept in suspense by mutual consent. *Livingston v. Maryland Ins. Co.* 6 Cranch, 274. 278.

135. The question, whether an abandonment be made in due time, is not a question of fact to be exclusively left to the jury, but is to be decided by them under the direction of the Court. *Livingston & Gilchrist v. Maryland Ins. Co.* 7 Cranch, 506. 540.

136. A technical total loss must continue to the time of abandonment. It is not necessary that it should be known to exist at the time of abandonment, for that is impossible; but that it should actually exist; a fact which admits of affirmative or ne-

gative proof at the trial. *Olivera v. Union Ins. Co.* 3 Wheat. 183. 195.

137. *Quære*, As to the application of this principle to a case where the loss was by a restraint on a blockade, and proof made of the commencement of the blockade, but no proof that it continued to the time of the abandonment? *Ib.*

138. The agent who makes insurance for his principal, has authority to abandon, without a formal letter of attorney. *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268. 272.

139. Any informality in the deed of cession is immaterial, because, if the abandonment is unexceptionable, the property vests immediately in the underwriters, and the deed is not essential to the right of either party. *Ib.*

140. If a formal deed of cession be demanded and refused, that may alter the law of the case. *Ib.*

(C) *Effects of an abandonment.*

141. If the abandonment be legal, it puts the underwriters immediately in the place of the assured, and the supercargo, or whoever else was his agent, becomes their agent. The acts of such agent are no longer the acts of the assured, and cannot affect the abandonment.

142. The underwriters upon a cargo, are not liable for freight, *pro rata itineris*, to the owner of the vessel, who is also owner of the cargo insured, in a case where the vessel and cargo were captured, the cargo abandoned to the underwriters as a total loss and by them accepted, the loss paid, the cargo condemned, restored upon appeal, and the proceeds of the cargo paid over to the underwriters. *Caze & Richaud v. Baltimore Insurance Co.* 7 Cranch, 358. 362.

143. As between the insured and the underwriter, on the cargo of a ship, the latter is in no case responsible for the payment of freight, whether there be an abandonment or not. *Ib.*

## JURISDICTION.

1. A Court Martial has no jurisdiction over a person not liable to be enrolled in the militia; its sentence is not conclusive evidence in an action brought in another Court; the members of the Court Martial, and the officer who executes its sentence, are all trespassers. *Wise v. Withers*, 3 Cranch, 331. 337.

2. The proceedings of inferior Courts of a special and limited jurisdiction, must state on their face enough to give the Court jurisdiction of the particular case, otherwise their judgments are absolute nullities. *Kempe's lessee v. Kennedy*, 5 Cranch, 173. 184.

3. All Courts, from which an appeal lies, are *inferior Courts* in relation to the appellate Court before which their judgment may be carried; but they are not, therefore, *inferior Courts* in the technical sense of those words. *Ib.*

4. These words apply to Courts of a special and limited jurisdiction, which are erected on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. *Ib.*

5. The Courts of the United States are all of *limited jurisdiction*, and their proceedings are erroneous, if the jurisdiction be not shown upon the face of the proceedings. Judgments in such cases may be reversed, but they are not absolute nullities which may be totally disregarded. *Ib.*

6. The Inferior Court of Common Pleas, for the county of Hunterdon, in New-Jersey, in May, 1779, had a general jurisdiction in all cases of inquisition for treason, and its judgments, although erroneous, were not void, inasmuch as the Court had jurisdiction. *Ib.*

*Et vide ADMIRALTY I. IV.*

*CONSTITUTIONAL LAW V.*

COURTS OF THE UNITED STATES.

CHANCERY VI.

PRIZE I.

STATUTES OF THE UNITED STATES V.

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## LEGACY.

D. devised all his estate to his executor, in trust, to convert the same into money, and after the payment of the debts, to invest the surplus in the funds, or put it out on interest. He then bequeaths £1,500 to E., to be paid at the age of 21, subject to the subsequent proviso; and directs £1,000 to be set apart, and the interest to be paid to S. during her life, and, after bequeathing other pecuniary legacies, provides, "that in case the personal estate, and the produce arising from the real estate, which I shall die seised and possessed of, *shall not be sufficient* to answer the said annuities and legacies herein before by me bequeathed, then, and in such case, I direct that the said annuities and legacies, so by me bequeathed, shall not abate in proportion; but the whole of such deficiency (if any there shall be) shall be deducted out of the £1,500 bequeathed to E.," whom he also makes his residuary legatee. The estate was more than sufficient, *at the time of the testator's death*, to pay all debts, annuities, and legacies, but afterwards, *by the bankruptcy of the executor*, became insufficient: held, that E.'s legacy of £1,500 should be liable to S.'s annuity. *Silsby v. Silsby, 3 Cranch, 250. 264.*

*Et vide CHANCERY III. (A) (C)*

## LEX LOCI.

- I. *Lex loci contractus.*
- II. *Lex loci rei sitæ.*
- III. *Lex fori.*

## LEX LOCI I.

*Lex loci contractus.*

1. In an action by the endorsee against the endorser of a foreign bill of exchange, the defendant is liable for damages according to the law of the place where the bill was endorsed; the endorsement being a new and substantive contract. *Slacum v. Pomeroy*, 6 *Cranck*, 221. 224.

2. Where a general authority is given to draw bills from a certain place on account of advances there made, the undertaking is to replace the money *at* that place; and upon a non-performance of that undertaking by the party giving the authority, the person making the advances, and drawing the bills, is entitled to recover the legal interest of that place. *Lanusse v. Barker*, 3 *Wheat.* 101. 146.

3. A discharge under a foreign bankrupt law is no bar to an action, in the Courts of this country, on a contract made here. *McMillan v. McNeil*, 4 *Wheat.* 209. 213.

4. It seems, that a discharge under a State insolvent act, from all debts, duties, contracts, and demands outstanding at the time of such discharge, upon a *cessio bonorum*, will not protect the debtor against a debt contracted in a foreign country with a foreigner. *Clarke's executors v. Van Riemsdyk*, 9 *Cranck*, 153.

## LEX LOCI II.

*Lex loci ræi sitæ.*

5. The *lex loci ræi sitæ*, and not the *lex loci contractus*, governs in the disposal of real property. The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate. *United States v. Crosby*, 7 *Cranck*, 115. *Robinson v. Campbell*, 3 *Wheat.* 212. 218.

6. Thus, where a party claimed title to land in Massachusetts, under a written instrument, *without a seal*, executed at the island of Grenada in the West Indies, before a notary public, according to the mode prescribed by the laws of the colony to pass real estates in that island, where both the parties to the instrument were domiciled at the time; and by the laws of Massachusetts no estate of freehold in lands can be conveyed unless by deed or conveyance under hand *and seal* of the party, and to perfect the title as against strangers, it is further necessary that it should be acknowledged before a proper magistrate, and recorded in the registry of deeds for the county where the land lies: *Held*, that such an instrument as that executed at Grenada was insufficient to convey a title to the land in Massachusetts. *The United States v. Crosby*, 7 *Cranck*, 115.

7. In cases depending on the statutes of a State, and more especially in those respecting titles to land, this Court adopts the construction given by the State Courts, where that construction is settled, and can be ascertained. *Polk's lessee v. Wendell et al.* 9 *Cranck*, 87. 98.

8. It is not necessary that an executor of a will made in one State, devising to the executor lands situate in another State, should take out letters testamentary in the State where the lands lie, to enable him to maintain an ejectment for the lands. *Doe, lessee of Lewis and Wife, v. M'Farland et al.* 9 *Cranck*, 151, 152.

9. Letters testamentary give to the executor no authority to sue for the personal estate of the testator out of the jurisdiction of

the State or sovereign power by which those letters are granted. *Doe, lessee of Lewis and Wife, v. M'Farland et al.* 9 Cranch, 151, 152.

10. But in a suit for lands devised to an executor, he sues as devisee. His right is derived from the will, and the letters testamentary do not give the title. *Ib.*

11. Where a citizen of Virginia, while Kentucky was a part of that State, made his will devising his lands in that part of the State, which is now Kentucky, to his executors, named in the will, "and to the survivors and survivor of such of them as may act, and their heirs, for the purpose of selling as much thereof as will pay all my debts." One of the executors named in the will alone qualified, but did not obtain letters testamentary until after Kentucky had become a separate State. *Held*, that when he took upon himself to act as executor, the condition on which the devise was made was performed, and he took as devisee under the will; and the act consummating his title had relation to the time of its commencement, which was before the separation of the two States. *Ib.*

13. A mere change of sovereignty does not produce any change in the state of private rights of property in the soil; and that whether the interest was acquired by law under a grant from the State or by individual contract. *Mutual Assistant Society v. Watts' executor*, 1 Wheat. 279. 282.

### LEX LOCI III.

#### *Lex fori.*

14. The bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States. *Harrison v. Sterry*, 5 Cranch, 289. 298. 302.

15. Therefore, creditors who have attached the property of their debtor in this country, according to the laws of a particular State, are entitled to a priority over the claim of his assignees for the benefit of the creditors generally under a foreign bankrupt law. *Ib.*

16. The law of the place where a contract is made is, generally speaking, the law of the contract; i. e. it is the law by which the contract is expounded. *Harrison v. Sterry*, 5 Cranch, 289. 298. 302.

17. But the right of priority of the government, over private creditors of a bankrupt, forms no part of the contract by which the debt was created. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the Court sits which is to decide the cause. *Ib.*

18. In this country, and in its Courts, in a contest respecting property lying in this country, the United States are not deprived of that priority which the laws give them, by the circumstance that the contract was made in a foreign country, with a person resident abroad. *Ib.*

19. In the case of the administration of the estate of a deceased person, the assets are always distributed according to the dignity of the debt, as regulated by the law of the country where the representative of the deceased acts, and from which he derives his powers; not by the law of the country where the contract was made. *Ib.*

20. The Orphan's Court, or other Court of Probates, has jurisdiction to allow probate of wills made by persons in foreign States; and that probate, once allowed, operates as a sentence affirming the validity of such wills between the parties, so far as the *lex loci* can give them operation. *Carter's heirs v. Cutting and Wife*, 8 Cranch, 251, 252.

21. An executor or administrator of a person who dies in a foreign country, cannot maintain an action in this country by virtue of letters testamentary granted to him abroad. *Fenwick v. Sears*, 1 Cranch, 259. *Dixon's executors v. Ramsay's executors*, 3 Cranch, 319. 323.

22. There is no difference, in this respect, between an executor and an administrator; for they both derive their power of maintaining suits from the letters testamentary. *Ib.*

23. All rights to personal property are regulated by the laws of the country where the deceased was domiciled; but the suits

for those rights must be governed by the laws of the country in which the tribunal is placed where they are prosecuted. *Fenwick v. Sears*, 1 *Cranch*, 259. *Dixon's executors v. Ramsay's executors*, 3 *Cranch*, 319. 323.

24. It seems, that a discharge from all debts, duties, contracts, and demands outstanding at the time of such discharge, upon surrender of all the debtor's property for the benefit of his creditors, under a State insolvent law, enacted before the establishment of the present constitution of the United States, will not protect him against a debt contracted in a foreign country with a foreigner. *Clarke's executors v. Van Riemsdyk*, 9 *Cranch*, 153.

25. A discharge under a foreign bankrupt law is no bar to an action in the Courts of this country, on a contract made in the United States. *McMillan v. McNeil*, 4 *Wheat*. 209.

## LIMITATION OF ACTIONS.

- I. *Limitation of personal actions.*
- II. *Limitation of real and possessory actions.*

### LIMITATION OF ACTIONS I.

#### *Limitation of personal actions.*

1. The presumption of payment which arises from the lapse of time, may be rebutted by any facts which destroy the reason of the rule. *Dunlop v. Ball*, 2 *Cranch*, 180. 184.
2. The presumption does not arise during a state of war, in which the plaintiff is an alien enemy. *Ib.*
3. The lapse of 20 years raises a presumption of payment in the case of a bond; but if during that time any legal impedi-

ments to the exercise of the plaintiff's right of action have existed, the period of 20 years, exclusive of the plaintiff's disability, must have elapsed, in order to raise the presumption. *Dunlop v. Ball*, 2 *Cranch*, 180. 184.

4. Where, notwithstanding the fourth article of the treaty of peace of 1783 between the United States and Great Britain, stipulating that creditors on either side should meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts previously contracted, several acts of Virginia, and the decisions in the Courts of that State, created or continued impediments to the recovery of such debt: *Held*, that the presumption of payment arising from the lapse of time, did not apply during the continuance of such impediments, and that 20 years must have elapsed exclusive of the period of the plaintiff's disability. *Ib.*

5. Under a statute of limitations, having a clause, "saving to all persons, *non compos mentis*, *femes covert*, *infants*, *imprisoned*, or out of this Commonwealth, who may be plaintiffs in such suits, three years after their several disabilities removed"—a creditor, resident in another State, removes his disability by *coming into the Commonwealth*, even for temporary purposes, provided the debtor be at that time within the Commonwealth. *Fair v. Roberdeau's executors*, 3 *Cranch*, 174.

6. The treaty of peace of 1783, between the United States and Great Britain, which stipulates, (art. 4.) "that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts heretofore contracted"—prevented the operation of a statute of limitations upon British debts contracted before that treaty. *Hopkirk v. Bell*, 3 *Cranch*, 454.

7. Under the statute of limitations of Virginia, the length of time from the giving the promissory note in question, to the commencement of the revolutionary war in 1775, not being sufficient to bar the demand on the note, the treaty of peace between Great Britain and the United States, of 1783, does not admit of

adding the time previous to the war, to any time subsequent to the treaty, in order to make a bar. *Hopkirk v. Bell, 3 Cranch, 454.*

8. The act of limitations is no bar to a British creditor's demand on a promissory note, dated the 21st of August, 1772, although one of the plaintiffs was in the country after the treaty of peace of 1783, viz. in 1784, and remained here until his death in 1785. *Hopkirk v. Bell, 4 Cranch, 164.*

9. Although the length of time which has elapsed between the day when a bond secured by mortgage became payable, and that on which the suit in equity was brought to enforce the payment against the mortgaged premises, is sufficient to raise a presumption of payment; yet that presumption may be met by circumstances which account for the delay in bringing the suit. *Higginson v. Meix, 4 Cranch, 415. 420.*

10. In a case, where the war of the revolution, and the events which succeeded the war, had not the same influence as in ordinary cases of British debts, in repealing the presumption of payment arising from the lapse of time, because the debtor was within the reach of his creditor, and might have been sued at a certain period; yet it did not appear with sufficient certainty where he was, nor what was his situation, to enable the Court to judge whether the delay in bringing the suit was or was not sufficiently accounted for, this Court instructed the Court below to direct an issue to try whether the bond in question had been paid. *Ib.*

11. The exception in the statute of limitations, 21 Jac. I. c. 16. s. 3. in favour of merchants' accounts, applies as well to actions of *assumpsit* as to actions of *account*. *Manderille v. Wilson, 5 Cranch, 15. 18.*

12. An account closed by the cessation of dealings between the parties, is not an *account stated*, and it is not necessary that any of the items should have been charged within the period of limitation. *Ib.*

13. A plea of the statute of limitations, which is good as to

one partner, bars them both, in a joint action. *Marssteller v. McLean*, 7 Cranch, 156. 158.

14. A recital in a deed is good evidence to take a case out of the statute of limitations.

Thus, where the plaintiff brought an action of assumpsit for money paid, laid out, and expended for the defendant's use, and the defendant pleaded the statute of limitations, to which the plaintiff replied a new promise, &c. and gave in evidence a deed of assignment, executed within the period of limitation, by the defendant, reciting, that the plaintiff, and others, had become his sureties for a debt to J. F., and having become accountable had paid the debt, and he, the defendant, being desirous to secure them as far as he could, assigned to T. V., one of his sureties, certain bonds, in trust, to collect the moneys due thereon, and distribute it equally among the sureties: *Held*, that this recital was a sufficient acknowledgment of the debt to take the case out of the statute of limitations. *King v. Riddle*, 7 Cranch, 168. 171.

15. Although this Court is not willing to extend the effect of casual or accidental expressions farther than it has been extended, to take a case out of the statute of limitations, and although the Court might be of opinion, that the cases on that point have gone too far, yet this was not a casual or incautious expression: the deed admitting the debt to be due on the day of its date, and the period of limitation not having afterwards elapsed before the suit was brought. *Ib.*

16. Under the statute of limitations of Maryland, of 1715, c. 23. which enacts, that "all actions, &c. other than such accounts as concern the trade of merchandize between merchant and merchant, their factors and servants, which are not residents within this province," &c. "shall be commenced or sued within three years ensuing the cause of such action, and not after," with the usual saving clause in favour of infants, *femæ covert*, *persons non compos mentis*, or beyond seas, the exception applies to dealings between a merchant creditor residing out of Maryland, and a debtor residing in Maryland. And in order to take

## LIMITATION OF ACTIONS.

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the case out of the exception, it is not sufficient to aver that the creditor returned to, came, and was within the State of Maryland after the cause of action accrued, and more than three years before the bringing of the suit. It must be averred, that the creditor had become a resident of the State more than three years before the institution of the suit. *Bond v. Jay*, 7 Cranch, 350.

17. It has been frequently decided, that an acknowledgment of a debt barred by the statute of limitations, takes the case out of that statute, and revives the original cause of action. *Clemensan v. Williams*, 8 Cranch, 72. *Ib.*

18. So far as decisions have gone on this point, principles may be considered as settled; and the Court will not lightly unsettle them. *Ib.*

19. But the decisions, taking cases out of the statute of limitations by evidence of an acknowledgment, have gone full as far as they ought to be carried, and this Court is not inclined to extend them. *Ib.*

20. The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away.

Thus, where an action of assumpsit was brought against J. C. and J. W., partners trading under the firm of J. C. & Co., and the statute of limitations was pleaded in bar. The plaintiff produced a witness who testified that he presented to J. C. a certain account against the said J. C. & Co., in favour of the plaintiff; and that J. C. stated that the account was due, and that he supposed it had been paid by his partner J. W., but had not paid it himself, and did not know of its being ever paid. Held, that this evidence was not sufficient to take the case out of the statute. *Ib.*

21. In this case there was no promise, conditional or unconditional; but a simple acknowledgment. This acknowledgment went to the original justice of the action; but this is not enough. *Ib.*

22. The statute of limitations was not enacted to protect persons from claims fictitious in their origin; but from ancient claims, whether well or ill founded, which may have been dis-

charged, but the evidence of discharge may be lost. *Clementson v. Williams*, 8 Cranch, 72. 74.

23. It is not then sufficient to take a case out of the statute, that the claim should be proved or be acknowledged to have been originally just; the acknowledgment must go the fact that it is still due. *Ib.*

24. In the above case, the acknowledgment of J. C. was, that he had not discharged the account presented to him, but he does not say that it was not discharged. *Ib.*

25. His partner might have paid it without the knowledge of J. C.; and, consequently, the declaration of J. C. that he had not himself paid it, and that he did not know whether his partner had paid it or not, is no proof that the debt remained due, and therefore is not such an acknowledgment as will take the case out of the statute of limitations. *Ib.*

26. The cases, which though within the letter of the statute of limitations, have been held to be without its spirit, are those only in which circumstances intervened, rendering it impossible, or inconsistent with known and established principles, that a cause of action could be revived by the renewal of the contract, or enforced by a suit at law within the time prescribed. *Richards et al. v. Maryland Ins. Co.* 8 Cranch, 84. 91.

27. The object of the statute of limitations is to secure the individual against the machinations of dishonesty, when attempted under the advantages attendant upon lapse of time, loss of papers, and death of witnesses. *Ib.*

28. But when cases present themselves in which no *laches* can be imputed to the plaintiffs, but great injustice would be done by applying to such cases the effect of the statute, the conclusion of reason and of the law is, that such cases were not in the mind of the legislature when enacting that statute. *Ib.*

29. Such are the cases of a want of parties, plaintiff or defendant, whereby a temporary suspension of legal remedy takes place. *Ib.*

30. But in no case of a voluntary abandonment of an action, has an equitable exception under the 4th section of the statute of

Limitations been supported. *Richards et al. v. Maryland Ins. Co.* 8 Cranch, 84. 91.

31. Thus if an executor do not cause himself to be made party to a suit brought in the life time, and in the name of the testator, and pending at his death, it is to be considered as a voluntary abandonment of the action, so as to exclude the executor from the equity of the exceptions to the statute of limitations. *Ib.*

32. Even under the antiquated doctrine of continuance by journey's accounts, such a continuance or connexion of suit was not allowed in a case of voluntary abandonment, and if the benefit of it was intended to be asserted, it was necessary to claim it in the form of renewing the action. *Ib.*

33. There is no difference as to the application of the statute of limitations to an action of assumpsit, whether it be a statute remedy or a common law remedy. Each must be pursued according to the general rule of law, unless a different rule be prescribed by statute; and where the remedy is limited to a particular form of action, all the general incidents of that action must attach upon it. *Beatty's administrators v. Burne's administrator,* 8 Cranch, 98, 107.

34. When a right has assumed the shape of a claim *in personam*, there cannot be attached to it a limitation exclusively applicable *in rem*. *Ib.*

35. The statute of limitations is, therefore, a good bar to an action of assumpsit for money had and received brought to try a title to lands in the city of Washington, under the provisions of the 8th sec. of the act of assembly of Maryland, of November, 1791, c. 45. *Ib.*

## LIMITATION OF ACTIONS II.

### *Limitation of real and possessory actions.*

36. The statute of limitations of Georgia, of 1787, which is substantially the same with that of the 21 Jac. I. c. 16. except that the time of limitation is seven years, does not require an en-

try into lands within seven years after title accrued, unless there be some adverse possession or title to be defeated by the entry.

*Titus*, where the lessor of the plaintiff in ejectment for lands in Georgia, produced in evidence two grants from the provincial government, dated in 1766, to A, B., under whom he claimed title by descent, and whose heir he proved himself to be, and there was no evidence of title or adverse possession on the part of the defendant, other than the averment of *ouster* in the declaration which was laid on the 10th of September, 1804, nor any evidence of an outstanding title: *Held*, that the statute of limitations did not require an entry by the plaintiffs' lessor into the lands within seven years, after his title accrued. *Shearman v. Irvine's lessee*, 4 *Cranch*, 367.

37. The statute of limitations as to lands is applicable to suits at law claiming the lands themselves, not to suits in equity brought for the purpose of subjecting the lands to the payment of debts for which they are mortgaged: The possession of the mortgagor, or those claiming under him, is not adverse to, but is compatible with, the rights of the mortgagee. *Higginson v. Mein*, 4 *Cranch*, 415. 419.

38. In order to avoid the plea of the statute of limitations to an action by joint tenants, it is necessary to show that all the plaintiffs were under a disability to sue.

Thus, where the plaintiffs brought an action of trespass *quare clausum fregit*, to which the defendant pleaded the statute of limitations, and the plaintiff replied, that at the time when the cause of action accrued, C., wife of one of the plaintiffs, and E., wife of another of the plaintiffs, "were *femes covertis*, and ever since have continued *femes covertis*," and "that K. H.," one of the plaintiffs, "was a *feme covert*;" and that the other plaintiffs, in whose right the suit was brought, at the time when the action accrued, and also at the commencement of suit, were infants: to which there was a general demurrer and joinder. *Held*, that the replication was insufficient, inasmuch as it did not allege that K. H. continued a *feme covert* until within the time prescribed by the statute of limitations. *Marsteller v. McClean*, 7 *Cranch*, 158. 158.

39. The terms "beyond seas," in the proviso or saving clause of a statute of limitations, are equivalent to *without the limits of the State* where the statute is enacted; and the party who is without those limits is entitled to the benefit of the exception. *Murray v. Baker*, 3 Wheat. 541. 545.

40. Where the defendant in ejectment has been in possession of the lands, under title in himself and those for whom he claims, during the period of limitation, such possession is a conclusive legal bar against the action by an adverse claimant, unless such claimant brings himself by positive proof within some of the disabilities provided for by the statute. In the absence of such proof, the title shown by the party in possession is so complete, as to prove, in an action upon a covenant against incumbrances, that a recovery obtained by the adverse claimant was not by a paramount legal title. *Somerville v. Hamilton*, 4 Wheat. 230.

41. A purchaser without notice has a right to join his adversary possession to the ostensible adversary possession of his vendor, so as to give himself the benefit of the statute of limitations. *Alexander et al. v. Pendleton*, 8 Cranch, 462. 468.

42. One tenant in common may oust his co-tenant, and hold in severalty; but a silent possession, unaccompanied by any act amounting to an ouster, or giving notice to the co-tenant that his possession is adverse, cannot be construed into an adverse possession. *M'Clung v. Ross*, 5 Wheat. 116. 124.

43. The construction of the statute of limitations of the 21st Jac. I. c. 16. and all other acts of limitation copied from it, is well settled, that the whole possession must be taken together; when the statute has once begun to run, it continues to run, notwithstanding any intervening legal disability of any person to whom the title may pass. *Wulden v. The heirs of Gratz*; 1 Wheat. 292. 296.

## LOCAL LAW.

- I. *District of Columbia.*
- II. *Georgia.*
- III. *Maryland.*
- IV. *New-Hampshire.*
- V. *Ohio.*
- VI. *Pennsylvania.*
- VII. *Rhode Island.*
- VIII. *South Carolina.*
- IX. *Tennessee and North Carolina.*
- X. *Vermont.*
- XI. *Virginia and Kentucky.* (A) *The laws of real property in general.* (B) *Statutes of wills and descents.* (C) *Bills of exchange and promissory notes.* (D) *Other local laws.*

## LOCAL LAW I.

*District of Columbia.*

1. The acts of Congress of the 27th of February and 3d of March, 1801, concerning the District of Columbia, have not changed the laws of Maryland and Virginia, adopted by Congress as the laws of that District, any farther than the change of jurisdiction rendered a change of laws necessary. *The United States v. Simms, 1 Cranch, 252.*
2. Fines, forfeitures, and penalties, arising from a breach of those laws, are to be sued for and recovered in the same manner as before the change of jurisdiction, *mutatis mutandis. Ib.*
3. An administrator having had letters of administration in Maryland, before the separation of the District of Columbia from

Maryland and Virginia, cannot, after the separation, maintain an action in that part of the District ceded by Maryland, under those letters of administration, but must take out new letters of administration within the District. *Fenwick v. Sears' administrators*, 1 *Cranch*, 259.

4. The inhabitants of the District of Columbia, by its separation from the States of Virginia and Maryland, ceased to be citizens of those States respectively. *Reily v. Lamar*, 2 *Cranch*, 343.

5. Under the insolvent law of Maryland, of the 3d of January, 1800, the Chancellor of Maryland could not discharge a citizen of that State who resided in the District of Columbia at the time of its separation from Maryland, unless the party had complied with all the requisites of the insolvent law, so as to entitle himself to a discharge before that separation. *Ib.*

6. The separation of Alexandria from the State of Virginia did not affect existing contracts between individuals. *Kern v. Mutual Assur. Society*, 6 *Cranch*, 192. 199.

7. Under the laws of Virginia, establishing the Mutual Assurance Society against fire in that State, insurance upon buildings in Alexandria did not cease by its separation from Virginia, although the Society could make no new contracts subsequent to its separation, until it had received additional powers, the law of Virginia limiting its insurances to houses within that State. *Ib.*

8. The obligation of the insured to contribute does not cease in consequence of his forfeiture of his insurance by his own neglect. *Ib.*

9. All the members of the Society are bound by the act of the majority. *Ib.*

10. No member can divest himself of his obligations as such, but according to the rules of the Society. *Ib.*

11. The additional premium upon a revaluation, under the rules of the Society, is only upon the excess. *Atkinson v. Mutual Assur. Society*, 6 *Cranch*, 202.

12. The proprietors of buildings in Alexandria, insured by

the Mutual Assurance Society against fire, were bound by the act of Assembly of Virginia of 1805, and the subsequent regulations of the Society, to pay an additional premium upon the increased rate of hazard, according to the new regulations of 1805. *Mutual Assur. Society v. Korn et al.* 7 Cranch, 396.

13. Under the 6th and 8th sections of the act of Assembly of Virginia of the 22d of December, 1794, property, pledged to the Mutual Assurance Society, &c. continues liable for assessments, on account of the losses insured against, in the hands of a *bona fide* purchaser without notice. *Mutual Assur. Society v. Watt's executors*, 1 Wheat. 279. 282.

14. A mere change of sovereignty produces no change in the state of rights existing in the soil; and the cession of the District of Columbia to the national government, did not affect the lien created by the above act on real property in the town of Alexandria, though the personal character or liability of a member of the Society could not be thereby forced on a purchaser of such property. *Ib.*

15. The corporation of Alexandria, under the act of Assembly of Virginia of the 4th of October, 1779, and several other subsequent acts made *in pari materia*,) which are, consequently, to be construed as one act,) has power to tax the lots and lands of non-residents. *Alexander v. The Mayor and Commonalty of Alexandria*, 5 Cranch, 1. 7.

16. All land or ground within the town of Alexandria, is liable to taxation by the corporation, whether consisting of half acre lots or not. *Ib.*

17. The taxes thus laid by the corporation of Alexandria cannot be recovered by a summary proceeding on motion, unless in the case of a person holding land who has no other property in the town. *Ib.*

18. A purchaser of real property in Alexandria is not personally liable for arrears of taxes assessed before his purchase. *Common Council of Alexandria v. Preston*, 8 Cranch, 53.

19. Suits brought by the bank of Alexandria upon promissory notes, made negotiable in that bank, are entitled to trial at

the return term of the writ. *Young v. The Bank of Alexandria, 5 Cranch, 45.*

20. The bank of Alexandria may maintain an action against the endorser of a promissory note made negotiable in that bank, although the endorsement was for the accommodation of the maker, and notwithstanding, by the local usage of Virginia, the implied contract of the endorser of a promissory note is only, that he shall pay the debt if by due diligence it cannot be obtained from the maker. *Yeaton v. The Bank of Alexandria, 5 Cranch, 49.*

21. The act of Assembly of Maryland, of 1793, c. 30. incorporating the Bank of Columbia, and giving to the corporation a summary process by execution, in the nature of an attachment against its debtors, who have, by an express consent in writing, made the bonds, bills, or notes, by them drawn or endorsed, negotiable at the bank, is not repugnant to the constitution of the United States, or of Maryland. *Bank of Columbia v. Oakely, 4 Wheat. 235. 241.*

22. But the provision in the act of incorporation which gives this summary process to the bank, is no part of its corporate franchises, and may be repealed or altered at pleasure by the legislative will. *Ib.*

23. The 17th section of the act incorporating the Mechanics' Bank of Alexandria, providing, "that all bills, bonds, notes, and every other contract or engagement on the part of the corporation, shall be signed by the President, and countersigned by the Cashier; and the funds of the corporation shall, in no case, be liable for any contract or engagement, unless the same shall be signed and countersigned as aforesaid"—does not extend to contracts and engagements implied in law. *Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326. 335.*

24. The act of Assembly of Maryland, of 1791, c. 45. which authorized the commissioners of the city of Washington, to reserve lots for default of payment by the first purchaser, contemplated a single resale only; and by that resale the power given by the act is executed. *Oneale v. Thornton, 6 Cranch, 53. 66.*

25. By selling and conveying the property to a *third* purchaser, the commissioners precluded themselves from setting up the *second* sale, and the *second* purchaser, by making this defence, affirmed the title of the *third* purchaser. *Oneale v. Thornton*, 6 *Cranch*, 53. 68.

26. In the sales of lots in the city of Washington, the lots are not chargeable for their proportion of the interval alley laid out for the common benefit of those lots; although the practice of so charging them has been heretofore universally acquiesced in by purchasers; and if a purchaser has acquiesced in that practice, and has received a conveyance accordingly, without objection; yet he does not thereby acquire a fee simple in such proportion of the alley, and may, in Equity, recover back the purchase money which he has paid therefor. *Pratt et al. v. Law & Campbell*, 9 *Cranch*, 456. 490.

27. If a purchaser of city lots stipulates to build, within a limited time, a house on every third lot purchased, or in that proportion, and receives conveyances for the greater part of the lots, he is not bound to build in proportion to the lots conveyed, unless the whole number be conveyed. *Ib.*

28. The marshal of the District of Columbia is bound to serve a subpoena in Chancery as soon as he reasonably can; and the service of such subpoena, in case of a *Chancery attachment* in Virginia, will make the garnishee liable if he pays away the money after notice of the subpoena. *Kennedy v. Brent*, 6 *Cranch*, 187.

29. An appeal lies to this Court, from an order of the Circuit Court for the District of Columbia, quashing an inquisition in the nature of a *writ ad quod damnum*. *Castis v. Turnpike Company*, 6 *Cranch*, 233.

30. The Circuit Court for the District of Columbia has no jurisdiction, upon motion, to quash an inquisition taken under the act of the 3d of March, 1809, "to authorize the making of a turnpike road from Mason's causey to Alexandria." *Ib.*

31. A discharge from imprisonment under the act of Congress for the relief of insolvent debtors within the District of Columbia,

is no bar to an action. It is only a discharge of the person, and does not affect the debt. *King v. Riddle*, 7 Cranch, 168.

32. A verdict and judgment that the mother was born free, is not conclusive evidence of the freedom of her children, unless between the same parties and privies. *Wood v. Davis*, 7 Cranch, 271.

33. Upon a writ of error to the Circuit Court for the District of Columbia; this Court has no jurisdiction, if the sum awarded be less than 100 dollars, (now 500 dollars,) although a greater sum may have been originally claimed. *Wise v. The Columbian Turnpike Co.*, 7 Cranch, 276.

34. The trustee of an insolvent debtor in the District of Columbia, represents the creditors of the insolvent, and may take advantage of a defect in a mortgage, of which the insolvent himself could not; as that the mortgage deed had not been recorded within the time limited by the law of Virginia, which declares that all deeds of mortgage, not recorded within eight months after their date shall be void as to creditors and subsequent purchasers without notice, though good between the parties to the deed. *Bank of Alexandria v. Herbert*, 8 Cranch, 36.

35. An appeal lies to this Court from the sentence of the Circuit Court for the District of Columbia; affirming the sentence of the Orphan's Court of Alexandria County, which dismissed a petition to revoke the probate of a will. *Carter's heirs v. Cutting and Wife*, 8 Cranch, 251.

36. This Court has no jurisdiction of causes brought before it, upon a certificate of a division of opinions of the judges of the Circuit Court for the District of Columbia. The appellate jurisdiction of this Court, in respect to that Court, only extends to the final judgments and decrees of the latter. *Ross v. Tripplett*, 3 Wheat. 600.

## LOCAL LAW II.

### Georgia.

37. According to the construction given by the Courts of

Georgia to the English statute 5 Geo. II. making lands in the colonies liable for simple contract debts, the lands in Georgia of a deceased debtor are liable in equity for the payment of his debts, without making the heir a party to the suit. The lands are assets until all the debts are paid. *Telfair v. Stead's executors*, 2 *Cranch*, 406.

38. The statute of limitations of Georgia does not require an entry into lands within seven years after the title accrued, unless there be some adversary possession or title to be defeated by such entry. *Shearman v. Irvine's lessee*, 4 *Cranch*, 367.

39. The statute of limitations of Georgia is intended for suits at law, claiming the lands themselves, and does not extend to suits in equity for the purpose of subjecting the lands to the payment of debts for which they are mortgaged. *Higginson v. Mein*, 4 *Cranch*, 415. 418.

40. The terms "beyond seas," in the proviso or saving clause of the statute of limitations of Georgia, are equivalent to "without the limits of the State"; and the party who is without those limits, is entitled to the benefit of the exception. *Murray v. Baker*, 3 *Wheat.* 541. 545.

41. By the tax laws of Georgia of 1790 and 1791, the collector was authorized to sell land only on the deficiency of personal estate; and then to sell only so much as was necessary to pay the taxes in arrear. *Stead's executors v. Course*, 4 *Cranch*, 403. 412.

42. Under the above-mentioned tax laws, the sale of a whole tract of land, when a small part would have been sufficient to pay the taxes, was void. *Ib.*

43. The act of Georgia of May, 1782, confiscated generally the estates of British subjects, with the exception of debts due to merchants residing in Great Britain, which were sequestered only. Under that act, a lien given, by a person who adhered to the British, to a British creditor, by mortgage, was not confiscated. The estate of the mortgagor only was confiscated, not that of the mortgagee. *Higginson v. Mein*, 4 *Cranch*, 415. 418.

44. By the laws of Georgia, a deed is valid, if recorded within

twelve months; but any deed recorded within ten days after its execution takes preference of deeds not recorded within that time. Under these laws, subsequent purchasers cannot impute fraud to a party who uses [all the diligence the law requires in recording his deed... If they sustain an injury within the twelve months, the time allowed for recording a deed, it is their own fault; since they might proceed to record their own deeds within the ten days, and thus secure the preference they seek. *Sherras et al. v. Craig & Mitchel*, 7 Cranch, 34. 50.

## LOCAL LAW III.

## Maryland.

45. A deed of lands in Maryland, signed, sealed, and delivered on the 30th of May, and acknowledged on the 14th of June, is to be considered as made on the 30th of May. *Wood v. Owings*, 1 Cranch, 239.

46. An action of debt will not lie in Maryland upon a promissory note. *Lindo v. Gardner*, 1 Cranch, 343.

47. Under the act of Maryland of 1791, c. 68, s. 5. if a bond be executed by O., as a surety for S., to obtain an appeal from the judgment of a justice of the peace; and the bond is rejected by the justice, and afterwards, without the knowledge of O., the name of W. be interlined as an obligor, and W. executes the bond, and the justice then accepts it, it is void as to O. *Oneale v. Long*, 4 Cranch, 60.

48. The right to freedom under the act of Maryland of 1783, which prohibits the bringing of slaves into that State, is not acquired by the neglect of the master to prove to the satisfaction of the naval officer, or collector of the tax, that such slave had resided three years in the United States, although such proof be required by the act. This part of the law is merely directory. *Scott v. Ben*, 6 Cranch, 1.

49. Claims to freedom in Maryland, are subject to the gene-

ral rule as to the inadmissibility of hearsay evidence. *Minta Queen and Child v. Hepburn*, 7 Cranch, 280.

50. The act of Assembly of Maryland of 1796, c. 67. prohibiting the importation of slaves into that State for sale or to reside, does not extend to a temporary residence, nor to an importation by a hirer or person other than the master or owner of such slave. *Henry v. Ball*, 1 Wheat. 1.

51. Evidence by hearsay and general reputation, is admissible only as to pedigree, but not to establish the freedom of the petitioner's ancestor, and thence to deduce his or her own. *Davis v. Wood*, 1 Wheat. 6.

52. Verdicts are evidence between parties and privies only; and a record proving the ancestor's freedom to have been established in a suit against another party by whom the petitioner was sold to the defendant in the present cause, is inadmissible evidence to prove the petitioner's freedom. *Ib.*

53. The statute of descents in Maryland of 1786, c. 45. has not declared how an intestate estate shall descend, which was derived to the intestate from his half brother, or from his brother of the whole blood, or from his son or daughter, or from his wife; but such estates are left to descend, as at common law. *Barnitz's lessee v. Casey*, 7 Cranch, 456. 464.

54. An equity of redemption of real property in Maryland, is liable to attachment, and was so liable before the act of Assembly of 1810, c. 60. *Pratt et al. v. Law & Campbell*, 9 Cranch, 456. 496.

55. By the statute of Maryland of 1763, c. 23. §. 8. which is, perhaps, only declaratory of the common law, an endorser has a right to pay the amount of the note or bill to the holder, and to be subrogated to all his rights by obtaining an assignment of the holder's judgment against the maker, *Lenox v. Prout*, 3 Wheat. 520. 525.

## LOCAL LAW IV.

*New Hampshire.*

56. A grant of a tract of land in equal share, to 63 persons, to be divided amongst them into 68 equal shares, with a specific appropriation of five shares, conveys only a sixty-eighth part to each person. *The Town of Pawlet v. Clark et al.* 9 Cranch, 292. 322.

57. If one of the shares be declared to be "for a glebe for the church of England, as by law established," that share is not helden in trust by the grantees, nor is it a condition annexed to their rights or shares. *Ib.*

58. At common law, the church of England, in its aggregate capacity, is not deemed a corporation, and cannot receive a donation *eo nomine*. *Ib.*

59. But a grant to the church of such a place, is good at common law, and vests the fee in the parson and his successors.

Thus, where lands were granted in 1761, in the charter of the town of Pawlet, under the late colonial government of New Hampshire, "for a glebe for the church of England as by law established"—if there had been such a church actually existing in Pawlet at the time of the grant, the grant would have vested the fee in the parson and his successors, as an endowment to be held *jure ecclesiae*. *Ib.*

60. The whole fee would have passed out of the crown, nor would it have been in the power of the crown to resume the grant. *Ib.*

61. In general, no grant can take effect, unless there be a sufficient grantee then *in esse* capable of taking it. But land, at common law, may be granted, *ad pios usos*, before there is a grantee in existence competent to take it, and in such case the fee would remain in abeyance, or be like the *haereditas jacens* of the Roman law in expectation of an heir. *Ib.*

62. Such a grant could not be resumed at the pleasure of the

crown, nor the property be aliened without the same consent which is necessary for the alienation of other church property. *The Town of Pawlet v. Clark et al.* 9 Cranch, 292. 322.

63. The common law, so far as it related to the erection of churches of the Episcopal persuasion of England, the right to present or collate to such churches, and the corporate capacity of the parsons thereof to take in succession, was recognized and adopted in New Hampshire before the revolution. *Ib.*

64. It belonged exclusively to the crown to erect the church, in each town, that should be entitled to take the glebe; and upon such erection to collate, through the governor, a parson to the benefice. *Ib.*

65. A voluntary society of Episcopalians within a town, unauthorized by the crown, could not entitle themselves to the glebe. *Ib.*

66. Where no such church was duly erected by the crown, the glebe remained in abeyance, or as an *hereditas jacens*; and the State, which succeeded to the rights of the crown, might, with the assent of the crown, alien or incumber it; or might erect an Episcopalian church therein, and collate, either directly or through the vote of the town, its parson, who would thereby become seized of the glebe, *jure ecclesie*, and be a corporation capable of transmitting the inheritance. *Ib.*

67. By the revolution, the State of Vermont succeeded to all the rights of the crown to the unappropriated, as well as appropriated glebes, within its limits. *Ib.*

68. By the statute of Vermont of the 30th of October, 1794, the respective towns became entitled to the property of the glebes therein situated. *Ib.*

69. That statute, so far as it granted the glebes to the towns, could not be repealed. *Ib.*

70. No Episcopalian society, or church in Vermont, can be entitled to the glebe, unless it was duly erected by the crown before the revolution, or by the State since. *Ib.*

71. In the various royal charters of townships in New-Hampshire, in which shares have been reserved for public purposes,

it has been held, that the shares for the first settled minister, and for a school, were vested in the town in its corporate capacity; in the latter case, as a fee simple absolute; in the former, as a base fee, determinable upon the settlement of the first minister by the town. *The Town of Pawlet v. Clark et al.* 9 Cranch, 292: 322.

72. The charter granted by the British crown to the trustees of Dartmouth College in New-Hampshire, in the year 1769, was not dissolved by the revolution. *Dartmouth College v. Woodward*, 4 Wheat. 518. 624.

73. The charter of Dartmouth College is a contract, within the meaning of that clause of the constitution of the United States, (art. 1. s. 10.) which declares that no State shall make any law impairing the obligation of contracts; and the acts of the legislature of New-Hampshire, of 1816, altering the charter, in a material respect, without the consent of the corporation, is an act impairing the obligation of the charter, and is unconstitutional and void. *Ib.*

74. Under its charter, Dartmouth College is a private, and not a public corporation. That a corporation is established for purposes of general charity, does not, *per se*, make it a public corporation, liable to the control of the legislature. *Ib.*

#### LOCAL LAW V.

##### Ohio.

75. The lands included within the Zanesville district by the act of Congress of the 3d of March, 1803, c. 343. [lxxxi.] s. 6. could not after that date be sold at the Marietta land office. *Matthews v. Zane's lessee*, 5 Cranch, 92.

#### LOCAL LAW VI.

##### Pennsylvania.

76. Under the act of the Legislature of Pennsylvania, of the 3d of April, 1792, entitled, "an act for the sale of the vacant

lands within this Commonwealth," the grantee, by a warrant of a tract of land lying north and west of the rivers Ohio and Alleghany, and Conewango creek, who, by force of arms of the enemies of the United States, was prevented from settling and improving the land, and from residing thereon for the space of two years from the date of his warrant, but who, during the same period, persisted in his endeavours to make such settlement and residence, is excused from making such actual settlement as the enacting clause of the 8th section of the act prescribes to vest a title in such grantee; and the warrant vests in such grantee a fee simple in the land. *Huideloper's lessee v. Douglass*, 3 Cranch, 1. 65.

77. Under the act of Pennsylvania of 1715, which requires a deed to be acknowledged before a justice of the peace of the county where the lands lie, it having been the long established practice before the year 1775, to acknowledge deeds before a justice of the Supreme Court of the province of Pennsylvania, and although the act of 1715 does not authorize such a practice; yet as it has prevailed, it is to be considered as a correct construction of the statute. *M'Keen v. Delancey's lessee*, 5 Cranch, 22. 31.

78. In construing the statutes of a State, on which land titles depend, infinite mischief would ensue, should this Court observe a different rule from that which has been long established in the State; and in the above case, the Court could not doubt that the Courts of Pennsylvania consider a justice of the Supreme Court as within the description of the act. *Ib.*

79. Under the same act, where a single tract of land is conveyed, the law requires the deed to be recorded in the office of the county in which the land lies; but if several tracts be conveyed, neither the letter nor the spirit of the act requires that the deed should be recorded in each county. If the deed was recorded in the county where a part of the lands lie, an exemplification of it is good evidence as to the lands in the other counties. *Ib.*

80. Under the above statute, the validity of the deed is not

affected by omitting to record it: Though not recorded, it is still binding to every intent and purpose whatsoever. The only legal affect produced by recording it, is its preservation by making a copy equal to the original. *McKeen v. Delancey's lessee*, 5 Cranch, 22. 31.

81. If two or more persons are sued in a joint action, in Pennsylvania, and the sheriff return *non est* as to one defendant, the plaintiff may proceed against the other on whom the writ was served, stating in his declaration the return of the writ as to his companion. *Barton v. Petit & Bayard*, 7 Cranch, 194. 201.

#### LOCAL LAW VII.

##### *Rhode Island.*

82. An action was brought in the Circuit Court for the District of Rhode Island, on certain bills of exchange drawn by the defendants, B. & F., and endorsed to the plaintiff, V. B. H. Subsequently to the service of the original writ, the defendant F. died; the other defendant B. came into Court, and after suggesting the death of F., pleaded the general issue; and the plaintiff, having likewise suggested the death of F., "prayed judgment against J. B. the surviving defendant." There was no joinder in issue, continuance, or other pleading; but immediately after the above prayer for judgment, the record proceeded as follows: "And the said J. B. made default: Whereupon this case being submitted to the Court, and the Court having fully heard the parties by their counsel, and mature deliberation being thereon had, it is considered by the Court now here, that the said V. B. H., do recover against the said J. B., the surviving partner as aforesaid, the sum of 34,455 dollars, and 27 cents, damages, and costs of suit, taxed at 16 dollars and 52 cents." To the record of this judgment, the following memorandum was annexed: "Nota Bene. The above sum, as ordered by the Court, includes the principal and interest from, &c. and 29 dollars and 22 cents charges of protest." Held, that under the laws,

and the practical construction of the Courts of Rhode Island, this judgment was legal. *Brown v. Van Bram*, 3 Dall. 344.

CHASE, J., assentiente, but on common law principles, and not in compliance with the laws and practice of the State. *Ib.*

83. By the laws and practice of Rhode Island, where judgment is entered by default, discontinuance, *nihil dicit, non sum informatus*, or on demurrer, the damages may be inquired into and assessed by the Court, or by a writ of inquiry, at the discretion of the Court; and where neither party demands a writ of inquiry, the record is made up as above. *Ib.*

84. By the laws and practice of Rhode Island, the non-attendance of the party, after plea pleaded and before trial, is considered as a default, and the Court proceed to enter judgment against him, and to assess the damages without the intervention of a jury. *Ib.*

85. It seems, that a discharge under the insolvent act of Rhode Island of 1756, from all debts, duties, contracts, and demands outstanding at the time of such discharge, upon surrender of all the debtor's property, will not protect him against a debt contracted in a foreign country with a foreigner. *Clarke's executors v. Van Riemsdyk*, 9 Cranch, 153.

86. Under the laws of Rhode Island, a discharge according to the act for the relief of poor prisoners for debt, although obtained by fraud, and perjury, is a lawful discharge, and not an escape; and upon such a discharge, no action can be maintained for an escape, upon a bond for the liberty of the prison yard. *Amidon v. Smith*, 1 Wheat. 447. 457.

87. But it seems that the effect of the false oath taken by the prisoner, and of the discharge granted by the magistrates, may be controverted in any proper proceeding against the parties, either in law or equity, other than in a suit on the bond for keeping the prison rules. *Ib.*

## LOCAL LAW VIII.

*South Carolina.*

88. By the law of South Carolina, administration *durante absentia* of the executor, cannot be granted after probate of the will and letters testamentary granted. *Griffith v. Frazier, 8 Cranch, 9. 22.*

89. By the law and practice of South Carolina, the thirty day rule is substituted for a *scire facias* on a judgment, in those cases only where lapse of time prevents the plaintiff from suing out execution. *Ib.*

## LOCAL LAW IX.

*Tennessee and North Carolina.*

90. The 9th section of the act of Assembly of North Carolina, passed in 1715, which directs that unless the creditors of deceased persons shall make their claims within seven years after the death of the debtor, they shall be barred, was repealed by the act of 1789, c. 23. notwithstanding the act of 1799, which declares the contrary. *Ogden v. Blackledge, 2 Cranch, 272.*

91. If an equitable title be merged in a grant, the party has no relief in equity, although the grant be void, as being contrary to law. *Preston v. Tremble, 7 Cranch, 354.*

92. Thus, where the bill stated that the plaintiff had title to lands in Tennessee; but that the defendant fraudulently and deceitfully entered and held him out. That the lands formerly lay within the State of North Carolina, during which time, one E. D. made an entry for the lands in due form, paid the purchase money to the State, and performed every other requisite to complete the contract; but before a patent was obtained, the Legislature of North Carolina passed a law, defining the limits of the Indian boundary, declaring null and void all entries and

surveys already made within those limits, and directing the entry takers to refund all moneys received therefor. That E. D. never received back the purchase money, nor consented to annul the contract. That the law rescinding the contract was void. That E. D. afterwards obtained a warrant to survey the land, and a patent therefor from the State of North Carolina, and conveyed the same to one J. R. who conveyed to the plaintiff. *Held*, that if the plaintiff had any title, it was at law; and that if he had no title at law, he could have none in equity, the equitable estate being merged in the grant. *Preston v. Tremble*, 7 *Cranch*, 354.

93. A deed for land in Tennessee, executed in North Carolina, in 1794, by grantors residing there, proved in 1797 by one of the subscribing witnesses before a judge in North Carolina, and recorded in 1808, in the proper county in Tennessee, is valid, and may be given in evidence in an ejectment. *Blackwell v. Patton et al.* 7 *Cranch*, 471. 475.

94. The first grant, by the State of North Carolina, upon an entry, is valid, although issued upon a duplicate warrant, the original being in the hands of the surveyor general, although a subsequent grant issue upon the original warrant for other lands.

*Ib.*

95. The act of North Carolina, of 1783, c. 2, opening the land office, did not prohibit a person from making several different entries, amounting in the whole to more than 5,000 acres, nor from purchasing the rights acquired by entries, nor from uniting several entries in one survey and patent; and such union of several entries is allowed by the act of 1784, c. 19. *Polk's lessee v. Wendell et al.* 9 *Cranch*, 87. 94.

96. In a patent, the obliteration of the consideration does not make void the grant. *Ib.*

97. In North Carolina, the want of an entry nullifies a patent. *Ib.*

98. A patent justifies the presumption, that all the previous requisites of the law have been complied with. *Ib.*

99. A patent is void at law if the State had no title, or if the

officer who issued the patent had no authority to issue it. *Polk's lessee v. Wendell et al.* 9 Cranch, 87. 94.

100. After the cession of the western territory by North Carolina to the United States in 1789, the State had no right to grant the lands within the ceded territory, to a grantee who had not an incipient title before the cession. *Ib.*

101. The question, whether such incipient title existed, is, therefore, open at law. *Ib.*

102. In general, a Court of Equity is the proper tribunal to investigate questions concerning the invalidity of a grant for causes anterior to its being issued. *Polk's lessee v. Wendell et al.* 9 Cranch, 87. 99.

103. But there are cases in which a grant is absolutely void; as where the State has no title to the thing granted; or where the officer has no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law. *Ib.* *Polk's lessee v. Wendell*, 5 Wheat. 293. 303.

104. The act of Assembly of North Carolina of November, 1777, establishing offices for receiving entries of claims for land in the several counties of the State, did not authorize entries for lands within the Indian boundary, as defined by the treaty of the *Long Island* of Holston, of the 20th of July, 1777. The act of April, 1778, is a legislative declaration explaining and amending the former act, and no title is acquired by an entry contrary to these laws. *Preston v. Browder*, 1 Wheat. 115. 121.

105. The acts of Assembly of North Carolina, passed between the years 1783 and 1789, avoid all entries, surveys, and grants of land set apart for the Cherokee Indians, and no title can be thereby acquired to such lands. *Danforth's lessee v. Thomas*, 1 Wheat. 155.

106. The boundaries of the reservation have been altered by successive treaties with the Indians; but, it seems, that the mere extinguishment of their title did not subject the land to appropriations, unless expressly authorized by the legislature. *Ib.*

107. The 10th section of the act of North Carolina of 1782,

which provides, "that 25,000 acres of land shall be allotted for, and given to, Major General Nathaniel Greene, his heirs and assigns, within the bounds of the land reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense this State entertains of the extraordinary services of that brave and gallant officer :"—is an absolute donation, not indeed of any specific land, but of 25,000 acres in the territory set apart for the officers and soldiers ; and when the commissioners afterwards allotted 25,000 acres of land to General Greene, and caused the tract to be surveyed, and the survey was returned into the proper office, the general gift became a particular gift of the 25,000 acres contained in the survey. *Rutherford v. Greene's heirs*, 2 Wheat. 196.

108. The validity of a legislative grant does not depend on its containing the technical terms usual in a conveyance. *Ib.*

109. A general permission to enter lands within a given tract of country, must, of necessity, be limited to lands not previously appropriated. *Ib.*

110. The title of General Greene, under the original gift to him by the act of 1782, is not impaired by any subsequent acts of the legislature of North Carolina. *Ib.*

111. Where the defendant in ejectment, for lands in North Carolina, has been in possession under title in himself, and those under whom he claimed, for a period of seven years, or upwards, such possession is, by the statute of limitations of North Carolina, a conclusive legal bar against the action by an adverse claimant, unless such claimant brings himself by positive proof within some of the disabilities provided for by that statute. In the absence of such proof, the title shown by the party in possession is so complete as to prove, in an action upon a covenant against incumbrances, that a recovery obtained by the adverse claimant was not by a paramount legal title. *Somerville v. Hamilton*, 4 Wheat. 230.

112. In the treaty of the 25th of October, 1805, with the Cherokees, the reservation of three miles square for a garrison, *sea below, and not above*, the mouth of the Highwassee, where

the United States had placed a garrison. *Meigs et al. v. M<sup>c</sup>Clung's lessee*, 9 Cranch, 9.

113. In Tennessee, under its statutes declaring an elder grant, founded on a junior entry, to be void, the priority of entries is examinable ~~as law~~, and the junior patent on the elder entry prevails over the elder patent on the junior entry. *Polk's lessee v. Wendell et al.* 9 Cranch, 87.

114. Under the act of the Legislature of Tennessee, passed in 1797, to explain an act of the Legislature of North Carolina, of 1715, relative to the title of lands, a possession of seven years is a bar only when held under a grant, or a deed founded on a grant. *Patton's lessee v. Easton*, 1 Wheat. 476.

115. The act of Assembly, vesting lands in the trustees of the town of Nashville, is a grant of those lands; and where the defendant in ejectment showed no title under the trustees, nor under any other grant, his possession of seven years was held insufficient to protect his title, or bar that of the plaintiff under a conveyance from the trustees. *Ib.*

116. Where the plaintiff in ejectment claimed title to lands in Tennessee, under a grant from said State, dated the 26th of April, 1809, founded on an entry made in the entry taker's office of Washington county, dated the 2d of January, 1779, in the name of J. McDowell, on which a warrant issued on the 17th of May, 1779, to the plaintiff in ejectment, as the assignee of J. McDowell; and the defendants claimed under a grant from the State of North Carolina, dated the 9th of August, 1787: held, that the prior entry might be attached to a junior grant so as to overreach an elder grant; and that a survey having been made, and a grant issued, upon McDowell's entry, in the name of the plaintiff, terming him assignee of McDowell, was *prima facie* evidence that the entry was the plaintiff's property. *Ross et al. v. Reed*, 1 Wheat. 482.

117. Where the plaintiffs in ejectment claimed under a grant from the State of North Carolina, comprehending the lands for which the suit was brought, and the defendants claimed under a junior patent, and a possession of seven years, which, by the

statutes of that State, and of Tennessee, constitutes a bar to the action, if the possession be under colour of title: to repel this defence, the plaintiffs proved that no corner or course of the grant, under which they claimed, was marked, except the beginning corner; that the beginning corner, and nearly the whole land, and all the corners except one, were within the Cherokee Indian boundary, not having been ceded to the United States until the year 1806, within seven years from which time the suit was brought; but the land in possession of the defendants, and for which the suit was brought, did not lie within the Indian boundary: *Held*, that notwithstanding the laws of the United States prohibited all persons from surveying or marking any lands within the Indian territory, and the plaintiffs could not, therefore, survey the land granted to them, the defendants were entitled to hold the part possessed by them for the period of seven years under colour of title. *M'Iver v. Ragan*, 2 Wheat. 25.

118. By the compact of 1802, settling the boundary line between Virginia and Tennessee, and the laws made in pursuance thereof, it is declared, that all claims and titles to lands derived from Virginia, or North Carolina, or Tennessee, which have fallen into the respective States, shall remain as secure to the owners thereof, as if derived from the government within whose boundary they have fallen, and shall not be prejudiced or affected by the establishment of the line. Where the titles, both of the plaintiff and defendant in ejectment, were derived under grants from Virginia, to lands which fell within the limits of Tennessee, it was held that a prior settlement right thereto, which would, in equity, give the party a title, could not be asserted as a sufficient title in an action of ejectment brought in the Circuit Court of Tennessee. *Robinson v. Campbell*, 3 Wheat. 212. 218.

119. Although the State Courts of Tennessee have decided, that, under their statutes declaring an elder grant founded on a junior entry, to be void, a junior patent founded on a prior entry shall prevail at law against a senior patent founded on a junior entry; this doctrine has never been extended beyond cases

within the express purview of the statute of Tennessee, and could not apply to the present case of titles deriving all their validity from the laws of Virginia, and confirmed by the compact between the two States. *Ib.*

120. The general rule being, that remedies in respect to real property are to be pursued according to the *lex loci rei sitae*; the acts of the two States are to be construed as giving the same validity and effect to the titles in the disputed territory, as they had, or would have, in the State by which they were granted, leaving the remedies to enforce such title to be regulated by the *lex fori*. *Ib.*

121. In the above case, it was held that the statute of limitations of Tennessee was not a good bar to the action, there being no proof that the lands in controversy were always within the original limits of Tennessee, and the statute could not begin to run until it was ascertained by the compact of 1802 that the land fell within the jurisdictional limits of Tennessee. *Ib.*

122. The State of North Carolina, by her act of cession of the western lands of 1789, c. 3. recited in the act of Congress of 1790, c. 33. accepting that session, and by her act of 1803, c. 3. ceding to Tennessee the right to issue grants, has parted with her right to issue grants for lands within the State of Tennessee, upon entries made before the cession. *Burton v. Williams*, 3 Wheat. 529. 533.

123. But it seems, that the holder of such a grant may resort to the equity jurisdiction of the United States' Courts for relief. *Ib.*

124. If there is nothing in a patent to control the *call* for course and distance, the land must be bounded by the courses and distances of the patent, according to the magnetic meridian. But it is a general principle, that the course and distance must yield to natural objects called for in the patent. *M'Iver's lessee v. Walker*, 4 Wheat. 444.

125. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to the actual survey; consequently, distances must be lengthened or

shortened, and courses varied, so as to conform to the natural objects *called for*. *McIver's lessee v. Walker*, 4 Wheat. 444.

126. If a patent refer to a plat annexed, and if in that plat a water course be laid down as running through the land, the tract must be so surveyed as to include the water course, and to conform as nearly as may be to the plat, although the lines, thus run, do not correspond with the courses and distances mentioned in the patent; and although neither the certificate of survey, nor the patent *calls for* that water course. *Ib.*

127. Under the laws of Tennessee, where lands are sold by a summary proceeding for the payment of taxes, it is essential to the validity of the sale, and of the deed made thereon, that every fact necessary to give the Court jurisdiction should appear upon the record. *McClung v. Ross*, 5 Wheat. 116. 119.

128. Under the statute of limitations of Tennessee, the running of the statute can only be stopped by actual suit, if the party claiming under it has peaceable possession for seven years. But such possession cannot exist if the party having the better right takes actual possession in pursuance of his right. *Ib.*

129. One tenant in common may oust his co-tenant, and hold in severalty; but a silent possession, unaccompanied by any act amounting to an ouster, or giving notice to the co-tenant that his possession is adverse, cannot be construed into an adverse possession. *Ib.*

130. A grant raises a presumption, that every prerequisite to its issuing has been complied with, and a warrant is evidence of the existence of an entry; but where the entry has never in fact been made, and the warrant is forged, no right accrues under the act of North Carolina of 1777, and the grant is void. *Polk's lessee v. Wendell*, 5 Wheat. 293. 303.

131. Where a party, in order to prove that there were no entries to authorize the issuing of the warrants, offered to give in evidence certified copies of warrants from the same office, of the same dates and numbers, but to different persons, and for different quantities of land: *Held*, that this was competent evidence to prove the positive fact of the existence of the entries specified

in the copies ; but that, in order to have a negative effect in disproving the entries alleged to be spurious, the whole abstract ought to be produced in Court, or inspected under a commission, or the keeper of the document examined as a witness, from which the Court might ascertain the fact of the non-existence of the contested entries. *Polk's lessee v. Wendell*, 5 Wheat. 293. 303. 310.

132. In such a case, certificates from the Secretary's office of North Carolina, introduced to prove, that on entries of the same dates with those alleged to be spurious, other warrants issued, and other grants were obtained in the names of various individuals, but none to the party claiming under the alleged spurious entries, is competent circumstantial evidence to be left to the jury. In such a case, parol evidence, that the warrants and locations had been rejected by the entry-taker as spurious, is inadmissible. *Ib.*

133. It seems, that whether a grant be absolutely void or voidable only, a junior grantee is not, by the law of Tennessee, permitted to avail himself of its nullity, as against an innocent purchaser without notice. *Ib.*

134. It is essential to the validity of a grant, that there should be a thing granted, which must be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what is conveyed. *Blake v. Doherty*, 5 Wheat. 359. 362.

135. Natural objects called for in a grant may be proved by testimony not found in the grant, but consistent with it. *Ib.*

136. The following description of the land granted, in a patent, is not void for uncertainty, but may be made certain by extrinsic testimony : " A tract of land in our middle district, on the west fork of Cane creek, the waters of Elk river, beginning at a hickory, running north 1,000 poles to a white oak ; then east, 800 poles to a stake ; thence west 800 poles to the beginning, as per plat hereunto annexed doth appear." *Ib.*

137. The plat and certificate of survey annexed to the patent, and a copy of the entry on which the survey was made, are admissible in evidence for this purpose. *Blake v. Doherty*, 5 Wheat. 359. 362.

138. A general plan made by authority, conformably to an act of the local legislature, may also be submitted, with other evidence, to the jury, to avail *quantum valere potest*, in ascertaining boundary. *Ib.*

139. But a demarcation, or private survey, made by direction of a party interested under the grant, is not admissible evidence, because it would enable the grantee to fix a vagrant grant by his own act. *Ib.*

## LOCAL LAW X.

*Vermont.*

140. In Vermont, tenants in common may maintain a joint action of ejectment. *Hicks v. Rogers*, 4 Cranch, 165.

## LOCAL LAW XI.

*Virginia and Kentucky.* (A) *The law of real property in general.* (B) *Statutes of wills and descents.* (C) *Bills of exchange and promissory Notes.* (D) *Other local laws.*

(A) *Laws of real property in general.*

141. W. D., for services rendered in the war of 1756, acquired under the royal proclamation of 1763, a right to 5,000 acres of unappropriated land in America, which right he assigned to C. S. By the terms of the proclamation, the personal application of W. D. was necessary to obtain a land warrant on this right; but the laws of Virginia enacted subsequent to the declaration of independence, dispensed with such personal application, and authorized a warrant to issue to the assignee, C. S.,

he being an inhabitant of that State on the 3d of May, 1779. C. S. accordingly obtained a warrant, and located the same on *Montour's Island*, the land in question, which his warrant was more than sufficient to cover. *Held*, that by these means C. S. acquired a complete *equitable* title to the land, which only required a patent of confirmation to render it a complete *legal* title; and that a confirmation as effectual as that of any patent could have been, was comprised in the compact of 1780 between Virginia and Pennsylvania, reserving and confirming rights which had been previously acquired under the former, in the territory relinquished to the latter State. *Sims v. Irvine*, 3 *Dall.* 425. 456.

142. It appearing in the above case, that C. S. had, since the compact, obtained a legal survey of the land under Pennsylvania, in which State, payment of money, or an equivalent consideration, and a warrant and survey, though unaccompanied by a patent, have been adjudged to give a *legal* right of entry; (either from a defect of Chancery powers, or for other reasons of policy and justice;) *Held*, that the right, having become an established legal right, and having incorporated itself as such with property and tenures, it remained a *legal* right, notwithstanding any new distribution of judicial powers, and must be regarded as a rule of decision on the common law side of the United States' Courts in Pennsylvania; and that, consequently, C. S. had a title sufficient to maintain an action of ejectment. *Ib.*

143. In the above case, the statute of limitations of Pennsylvania of the 26th of March, 1785, related only to Pennsylvania warrants or improvement rights, and there appeared no such laches on the part of the plaintiff as the statute contemplated to prevent. *Ib.* 457. 466.

144. On the trial of an action for the breach of a covenant of seizure of lands in Virginia, the question, whether a patent from the State of Virginia for the lands be voidable by that State, is not examinable. While it remains in force, it is a valid

title, and vests the fee simple estate in the patentee. *Pollard v. Dwight*, 4 *Cranck*, 421. 431.

145. Lord Fairfax, at the time of his death in 1781, had the absolute property, seizin, and possession of the waste and unappropriated lands in the Northern Neck of Virginia, by virtue of the royal grants of 2 Charles II. and 4 James II. *Fairfax's devisee v. Hunter's lessee*; 7 *Cranck*, 603 618.

146. An alien enemy may take lands in Virginia by devise, and hold the same until office found. *Ib.*

147. The commonwealth of Virginia could not grant the unappropriated lands in the Northern Neck, as escheated or forfeited, until its title should have been perfected by possession; and the British treaty of 1794 confirmed the title of those lands in the devisee of Lord Fairfax. *Ib.*

148. The act of Virginia of 1786, c. 27. reforming the proceedings in writs of right, did not vary the rights or legal predicament of the parties, as they existed at the common law. *Green v. Liter et al.* 8 *Cranck*, 229. 243.

149. Under the act of Virginia of 1780, c. 27. the tenant may, at his election, plead any special matter in bar in a writ of right, or give it in evidence on the mise joined. The act is not compulsive, but cumulative. *Ib.*

150. The act of Virginia of 1786, c. 27. did not change the nature of the inquiry as to the titles of the parties to a writ of right. *Ib.*

151. Under the land law of Virginia of 1779, c. 13. the whole legal estate and seisin of the Commonwealth pass to the patentee upon the issuing of his patent, in as full and beneficial a manner (subject only to the rights of the Commonwealth) as the Commonwealth itself held them. *Green v. Liter et al.* 8 *Cranck*, 229. 247.

152. The land law of Virginia, which gives a right of pre-emption to those who had marked and improved land before the year 1778, refers that right to the time when the improvement was made, and to the time of the passage of the act, and not to the time when the claim for such pre-emption was made before

the Court of Commissioners. *Simms v. Guthrie et al.* 9 *Cranch*, 19. 23.

153. If an entry be made by the assignee of a pre-emption right, it will be good, although the name of the assignor be not mentioned in the entry, if the entry refer to the warrant, and if it mention an improvement; provided the place be described with sufficient certainty in other respects. *Ib.*

154. The religious establishment of England was adopted by the colony of Virginia, together with the common law upon that subject, so far as it was applicable to the circumstances of the colony. *Terrett et al. v. Taylor et al.* 9 *Cranch*, 43. 46.

155. By the operation of colonial statutes and the common law, the lands purchased for the use of the Episcopal church became vested in the church, and the minister for the time being was seized of the freehold. *Ib.*

156. The rights of property so acquired by the church, remained unimpaired, notwithstanding the revolution. *Ib.*

157. The property acquired by the church did not, at the revolution, become the property of the State. *Ib.*

158. The act of Virginia of 1770, c. 2, confirming to the church its right to lands, was not inconsistent with the constitution or bill of rights of Virginia, and operated as a new grant to the church, vesting an indefeasible and irrevocable title. *Ib.*

159. The acts of 1784, c. 88. and of 1785, c. 37. did not infringe any of the rights, intended to be secured under the constitution of the State, either civil, political, or religious. *Ib.*

160. The acts of 1798, c. 9. and of 1801, c. 5. are not operative, so far as to devest the Episcopal church of its property acquired, previous to the revolution, by purchase or by donation. *Ib.*

161. The act of 1798, c. 9. admitting it to have its fullest operation, merely repeals the statutes passed respecting the church since the revolution; and left in full force all the statutes previously enacted, so far as they were not inconsistent with the present constitution. *Ib.*

162. It left, therefore, the provisions of the statutes of 1661, 1696, 1727, and 1748, so far as it respected the title to the church lands, in perfect vigour, with so much of the common law as attached upon these rights. *Terrett v. Taylor*, 9 *Cranch*, 19. 23.

163. There is no statute of Virginia, which makes church wardens a corporation for the purpose of holding lands: and at common law, their capacity was limited to personal estate. *Ib.*

164. But a covenant of general warranty in a deed of lands binding the grantors and their heirs forever, and warranting the land to the church wardens and their successors forever, may well operate by way of estoppel to confirm to the church and its privies the perpetual and beneficial estate in the land. *Ib.*

165. No alienation or sale of the church lands can take place without the assent of the minister, if the church be full. *Ib.*

166. If, under the Virginia land law, the warrant must be lodged in the office of the surveyor at the time when the survey is made, his certificate, stating that the survey was made by virtue of the governor's warrant, and agreeably to the royal proclamation of 1763, is sufficient evidence that the warrant was in his possession at that time. *Craig v. Radford*, 3 *Wheat.* 594.

167. The 6th section of the act of Virginia of 1748, entitled, "An act directing the duty of surveyors of lands," is merely directory to the officer, and does not make the validity of the survey depend upon his conforming to its requisitions. *Ib.*

168. A survey, made by the deputy surveyor, is, in law, to be considered as made by the principal surveyor. *Ib.*

169. The rule which prevails in Kentucky and Ohio, as to land titles, is, that, *at law*, the patent is the foundation of title, and neither party can bring his entry before the Court: but a junior patentee, claiming under an elder entry, may, *in Chancery*, support his equitable title. *M'Arthur v. Browder*, 4 *Wheat.* 488. 491.

170. A description which will identify the lands is all that is necessary to the validity of a grant: but the law requires that an entry should be made with such certainty, that subse-

quent purchasers may be able to locate the adjacent residuum. *M<sup>r</sup> Arthur v. Browder*, 4 Wheat. 488. 492.

171. An entry for 1,000 acres of land, in Ohio, on Deer Creek, "beginning where the upper line of Ralph Morgan's entry crosses the creek, running with Morgan's line on each side of the creek 400 poles, thence up the creek 400 poles in a direct line with the upper line at right angles with the side lines for quantity," is a valid entry. *Ib.*

172. There is a distinction between amending and withdrawing an entry. An amended entry retains its original character, so far as it is unchanged by the amendment. So far as it is changed, it is a new entry. *Ib.* 495.

173. The decision of the District Court of Kentucky District, upon a *caveat*, is not final; but a writ of error lies from the judgment of that Court in such a case. *Wilson v. Mason*, 1 Cranch, 45. 91.

174. The acts of Assembly of Virginia, making the judgments of the District Courts of the State final in cases of *caveat*, and the compact between Virginia and Kentucky, stipulating that rights and interests in lands acquired under the commonwealth of Virginia should be decided according to the then existing laws, do not make the decisions of the District Court of Kentucky District final in cases of *caveat*. *Ib.*

175. The above compact between Virginia and Kentucky must be considered as providing for the preservation of titles, not for the tribunals which should decide on those titles. *Ib.*

176. The appellate jurisdiction of this Court being described in the judiciary act of 1789, c. 20. ss. 10. 13. 22. in general terms so as to comprehend the case of a *caveat*, and that act not containing any exception or regulation which would exclude a *caveat* from its general provisions, it is a case within the appellate jurisdiction of this Court. *Ib.*

177. Waste and unappropriated lands in Kentucky, in the year 1780, could not be lawfully appropriated by survey alone, without a previous legal entry in the book of entries. *Ib.* 95.

178. A survey of lands in Kentucky, not founded on an entry,

is a void act, and constitutes no title whatever in law or equity. Consequently, the land so surveyed remains vacant, and liable to be appropriated by any person holding a land warrant. *Wilson v. Mason*, 1 *Cranch*, 45. 101.

179. The purchase of the land warrant gives a power to appropriate, but is no appropriation; and the mode pointed out by the legislature is that which can alone give title to the particular lands. *Ib.*

180. But even if an act equivalent to an entry could be received as a substitute for an entry, a survey does not appear to be such an act, nor does it seem to have been so considered by the legislature. *Ib.*

181. Even where complete notice is in fact obtained by a survey, the law cannot consider it as of equal effect with an entry. Land titles must rest on general principles, and, in general, a survey would not, without something more than the law requires, be notice. *Ib.*

182. Notice of a survey will not create a title in equity; for the holder of the survey has no equity, and there is nothing for which the purchaser of the legal title can be a trustee. *Ib.*

183. The terms of the land law of Virginia, "if any person shall obtain a survey of lands to which another hath by law a better right, the person having such better right may in like manner enter a caveat," &c. do not absolutely require that the better right should exist at the time the survey is obtained. The remedy extends to a better right existing at the time when the caveat may be entered. *Ib.*

184. The assignee of a pre-emption warrant is a competent witness, if the facts intended to be proved by his testimony do not tend to support the title of the party producing him. *Wilson v. Speed*, 3 *Cranch*, 283. 290.

185. A general dismissal of the plaintiffs' *caveat* does not purport to be a judgment upon the merits. *Ib.*

186. Loose and vague expressions in an entry of lands in Kentucky, may be rendered sufficiently certain, by reference to natural objects mentioned in the entry, and by comparing the

courses and distances of the lines with those natural objects.  
*Marshall v. Currie, 4 Cranch, 172.*

187. The practice in Kentucky, of resorting to a Court of Chancery, in order to set up an equitable title against the legal title, where the defendant has obtained a prior patent for land to which the complainant had the better right under the land law, received, in its origin, the sanction of the Court of Appeals of Virginia while Kentucky remained a part of that State, and has been so confirmed, by an uninterrupted series of decisions, as to be incorporated into the system of local law, and cannot now be shaken. *Bodley v. Taylor, 5 Cranch, 191. 221.*

188. In such a case, a prior entry will be considered as notice to him who has the legal title, if such entry be sufficiently certain; and the legal title will be considered as held for him who has the prior equity. *Ib.*

189. In deciding claims of this description, a Court of Equity acts upon its known, established, and general principles; and is not merely substituted for a Court of Law, with power to decide questions respecting rights under the statute, as they existed previous to the consummation of those rights by patent. *Ib.*

190. In all cases in which a Court of Equity assumes jurisdiction, it will exercise that jurisdiction upon its own principles, and the state of land titles in Kentucky does not furnish an exception to this rule. *Ib.*

191. The true ground of the jurisdiction of a Court of Equity over those titles is, that an entry is considered as a record, of which a subsequent locator may have notice, and therefore must be presumed to have it; consequently, although he may obtain the first patent, he is liable, in equity, to the rules which apply to a subsequent purchaser with notice of a prior equitable right. *Ib.*

192. Entries of land in Kentucky must have that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own lands on the adjacent residuum. *Ib.*

193. If the entry be placed on a road at a certain distance

from a given point by which the road passes, the distance is to be computed by the meanders of the road, and not by a straight line. *Bodley v. Taylor*, 5 Cranch, 191. 221.

194. If the entry be of a settlement, and pre-emption to a tract of land lying on the east side of a road, the 400 acres allowed for the settlement right must be surveyed entirely on the east side of the road, and in the form of a square. *Ib.*

195. A call for the settlement right is sufficiently certain, but a call for the pre-emption right is too vague, and must be rejected. *Ib.*

196. A defendant in equity who has obtained a patent for land not included in his entry, but covered by the plaintiff's entry, will be decreed to convey it to the plaintiff; but the plaintiff will not be required to convey to the defendant the land for which he (the plaintiff) has obtained a patent, which was covered by the defendant's entry, but which, by mistake, the defendant omitted to survey. *Ib.*

197. The first survey under a military land warrant in Virginia gives the prior equity. The survey is the act of appropriation. *Taylor v. Brown*, 5 Cranch, 234. 241.

198. The certificate of survey is sufficient evidence that the warrant was in the hands of the surveyor. *Ib.*

199. That clause of the land law which requires every survey to be recorded within two months after it is made, is merely directory to the surveyor; and his neglect to record it does not invalidate the survey. *Ib.*

200. It is not necessary that the deputy surveyor, who made the survey, should make out the plat and certify it. It may be done from his notes by the principal surveyor. *Ib.*

201. A subsequent locator, without notice of the prior location, cannot protect himself by obtaining the elder patent. *Ib.*

202. A survey is not void because it includes more land than was directed to be surveyed by the warrant. *Ib.*

203. The patent relates to the inception of title; and, therefore, in a Court of Equity, the person who has first appropriat-

ted the land has the best title, unless his equity is impaired by the circumstances of the case. *Taylor v. Brown*, 5 Cranch, 234. 241.

204. The locator of a warrant himself undertakes to find waste and unappropriated land, and his patent issues upon his own information to the government, and at his own risk. He cannot be considered as a purchaser without notice. *Ib.*

205. The equity of the prior locator extends to the surplus land surveyed, as well as to the quantity mentioned in the warrant. *Ib.*

206. If, by any reasonable construction of an entry, it can be supported, the Court will support it. *Massie v. Watts*, 6 Cranch, 148. 165.

207. When a given quantity of land is to be laid off on a given base, it shall be included within four lines forming a square, as nearly as may be, unless the form be repugnant to the entry. *Ib.*

208. If the calls of an entry do not fully describe the land, but furnish enough to enable the Court to complete the locations by the application of certain principles, it will thus complete it. *Ib.*

209. If a location have certain material calls sufficient to support it, and to describe the land, other calls less material and incompatible with the essential calls of the entry, may be discarded. *Ib.*

210. The rectangular figure is to be preserved, if possible. *Ib.*

211. If an agent locate land for himself, which he ought to locate for his principal, he is, in equity, an agent for his principal. *Ib.*

212. Under the act of Kentucky, to amend process in Chancery and at common law, the party may recover, although he prove only part of his claim in his declaration; but it does not enable him to join parties in an action who could not be joined at common law. *Green v. Liter et al.* 8 Cranch, 229. 243.

213. In Kentucky, the Courts of Law will not look beyond the patent, but Courts of Equity will; and give validity to the

elder entry against the elder patent. *Finley v. Williams et al.* 9 *Cranch*, 164. 167.

214. The Courts of the United States have conformed to this practice, and adopted the principle. *Ib.*

215. Between pre-emption rights, the prior improvement will hold the land against a prior certificate, entry, survey, and patent. *Ib.*

216. It is not essential to the dignity of an entry upon a pre-emption warrant, that the entry should, in terms, call for the improvement, although it must in fact include the improvement. *Ib.*

217. An entry calling for "the Big Blue Lick," will not support a survey and patent for land at the Upper Blue Lick; the Lower Blue Lick being generally called "the Big Blue Lick;" although there may be other calls in the entry which seem to designate the Upper Blue Lick as the place intended. *Ib.*

218. The law of Kentucky requires, in the location of warrants for land, some general description designating the place where the particular object is to be found, and a description of the particular object itself. *Matson v. Hard*, 1 *Wheat.* 130.

219. The general description must be such as will enable a person intending to locate the adjacent residuum, and using reasonable care and diligence, to find the object mentioned in that particular place, and avoid the land already located. If the description will fit another place better, or equally well, it is defective. *Ib.*

220. "The hunter's trace leading from Bryant's station over to the waters of Hinkston, on the dividing ridge between the waters of Hinkston and the waters of Elkhorn," is a defective description, and will not support an entry. *Ib.*

221. Under the act of Assembly of Kentucky of 1798, entitled, "An act concerning champerty and maintenance," a deed will pass the title to lands, notwithstanding an adverse possession. *Walden v. The heirs of Gratz*, 1 *Wheat.* 292. 295.

222. The statute of limitations of Kentucky does not differ

essentially from the English statute of the 21st James I. c. 1. and is to be construed as that statute, and all other acts of limitation founded upon it have been construed. The whole possession must be taken together: when the statute has once begun to run, it continues, and an adverse possession, under a survey, previous to its being carried into grant, may be connected with a subsequent possession. *Walden v. The heirs of Gratz*, 1 Wheat. 292. 296.

223. In taking the distance from one point to another, on a large river, the measurement is to be with its meanders, and not in a direct line. *Johnson v. Pannel's heirs*, 2 Wheat. 206. 211.

224. In ascertaining a place to be found by its distance from another place, the vague words, "about," or "nearly," and the like, are to be rejected, if there are no other words rendering it necessary to retain them; and the distance mentioned is to be taken positively. *Ib.*

225. As entries in a wilderness most generally refer to some prominent and notorious natural object, which may direct the attention to the neighbourhood in which the land is placed, and then to some particular object, exactly describing it—the first of these is denominated the general or *descriptive call*, and the last the particular or *locative call* of the entry. Reasonable certainty is required in both. *Ib.*

226. If the descriptive call will not inform a subsequent locator in what neighbourhood he is to search for the land, the entry is defective, unless the particular object is one of sufficient notoriety. *Ib.*

227. If, after having reached the neighbourhood, the locative object cannot be found within the limits of the *descriptive calls*, the entry is also defective. *Ib.*

228. A single call may be, at the same time, of such a nature (as, for example, a *spring* of general notoriety) as to constitute within itself both a *call of description and of location*; but, if this call be accompanied with another, such as a *marked tree at the spring*, it seems to be required that both should be satisfied. *Ib.*

229. The call for an unmarked tree, of a kind which is common in the neighbourhood of a place, sufficiently described by the other parts of the entry to be fixed with certainty, may be considered as an *immaterial call*. *Johnson v. Pannel's heirs*, 2 Wheat. 206. 211.

230. Therefore, where the entry was in the following words, "D. P. enters 2,000 acres, on a treasury warrant, on the Ohio, about twelve miles below the mouth of Licking, beginning at a hickory and sugar tree on the river bank, running up the river from thence 1,060 poles, thence at right angles to the same, and back for quantity"—it was held, that the call for a sugar tree might be declared immaterial, and the location be sustained on the other calls. *Ib.*

231. In the above case, the entry was decreed to be surveyed, beginning twelve miles below the mouth of Licking, on the bank of the Ohio, and running up that river 1,060 poles; which line was to form the base of a rectangular parallelogram to include 2,000 acres of land. *Ib.*

232. The boundary of the State of Kentucky extends only to low water mark on the western side of the river Ohio; and does not include a peninsula, or island, on the western or north-western bank, separated from the main land by a channel or bayou, which is filled with water only when the river rises above its banks, and is, at other times, dry. *Handly's lessee v. Anthony*, 5 Wheat. 374. 379.

233. When a river is the boundary between two nations or States, if the property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State (Virginia) is the original proprietor, and grants the territory on one side only, it retains the river within its domain, and the newly erected State extends to the river only, and the low water mark is its boundary. *Ib.*

234. The following entry is invalid for want of that certainty and precision required by law: "William Perkins and William Hoy enter 6,714 acres of land on a treasury warrant, No. 10,692, to join Lawrence Thompson and James M'Millan's en-

try of 1,000 acres that is laid on the adjoining ridge, between Spencer's Creek and Hingston's fork of Licking, on the east, and to run east and south for quantity." The entry referred to in the foregoing was as follows: "9th of December, 1782, Lawrence Thompson, and James M'Millan, assignee of Samuel Baker, enter 1,000 acres on a treasury warrant, No. 4,222, on the dividing ridge between Hingston's fork of Licking, and Spencer's creek, a west branch of said fork, to include a large pond in the centre of a square, and a white oak tree marked X. also an elm tree marked V S, near the side of the pond." *Perkins v. Ramsey*, 5 Wheat. 269.

(B) *Statutes of wills and descent.*

235. Under the act of Assembly of Virginia, for reducing into one the several acts concerning wills, c. 92. s. 58. limiting certain suits against executors, and administrators to causes of action arising within five years before the death of the testator or intestate; with a clause "saving to all persons *non compos mentis*, feme covert, infants, imprisoned, or out of the Commonwealth, three years after their several disabilities removed," a creditor resident in another State, removes his disability, by coming into the Commonwealth even for temporary purposes; provided the debtor be at that time within the Commonwealth. *Faw v. Robdeau's executors*, 3 Cranch, 174.

236. The act of Virginia concerning dower, which enacts, that "if any estate be conveyed by deed or will, either expressly or by averment, in lieu of dower," &c. "such conveyance shall bar the widow's dower of the residue,"—is construed to authorize an allegation and proof by matter *dehors* the will, that the provision in the will is made in lieu of dower; but with this exception, the act does not vary the previously existing common law on the subject of dower. *Herbert v. Wren*, 7 Cranch, 370. 377.

237. By the statute of wills, of Virginia, passed in 1785, which declares that any person, aged 21 years and upwards, being of sound mind, and not a married woman, shall have power, at his

will and pleasure, by last will and testament in writing, to devise all the estate, right, title, and interest, in possession, reversion, or remainder, which he hath, or at the time of his death shall have, of, in, or to lands," &c. in order that lands purchased after the date of the will should pass by it, the testator's intention to make such a disposition must clearly appear upon the face of the will. *Smith et al. v. Edrington*, 8 Cranch, 66. 69.

238. The statute created no new or different rule of construction than the common law rule, that a will, as to land, speaks at the date of it; but merely gave a power to the testator to devise lands which he might possess, or be entitled to, at the time of his death, if it should be his pleasure to do so. *Ib.*

239. But the presumption is, that the testator means to confine his bequests to lands to which he is entitled at the date of his will; and this presumption can only be overruled by words clearly showing a contrary intention. *Ib.*

240. Previous to the year 1775, H. S. of Virginia, cohabited with A. W., and had by her the appellants, whom he recognised as his children. In July, 1775, he made his will; which was duly proved after his decease, in which he described them as the children of himself, and of his wife A., and devised the whole of his property to them and their mother. In June, 1776, he was appointed a colonel in the Virginia line, upon the continental establishment, and died in the service, having, in July, 1776, intermarried with the mother, and died, leaving her pregnant with a child who was afterwards born, and named R. S. After the death of H. S., and the birth of his posthumous child, a warrant for a tract of military lands was granted by the State of Virginia to the posthumous son R. S., who died, in 1796, in his minority, without wife or children, and without having located or disposed of the warrant. His mother also died in 1796. *Held*, 1st. That the children of H. S. were not entitled to the lands, as devisees under his will, by the act of Assembly under which the warrant was granted; nor did the will so far operate, as to render them capable of taking under the act, as being named his legal representatives in the will. 2dly. That the appellants were

not legitimated by the marriage of H. S. with their mother, and his recognition of them as his children, under the 19th section of the act of descents of Virginia of 1785, which took effect on the 1st of January, 1787, and provides that, "where a man, having by a woman one or more children, shall afterwards intermarry with such woman, such child or children, if recognised by him, shall be thereby legitimated." 3dly. That they were not, as illegitimate children of H. S. and A. W. capable of inheriting from B. S. under the 18th sec. of the same act of descents, which provides that, "In making title by descent, it shall be no bar to a party that any ancestor, through whom he derives his descent from the intestate is, or hath been, an alien. Bastards also shall be capable of inheriting, or of transmitting inheritance, on the part of their mother, as if they had been lawfully begotten of such mother." *Stevenson's heirs v. Sullivan*, 5 Wheat. 207. 255.

(C) *Bills of exchange and promissory notes.*

241. The act of Assembly of Virginia of 1748, giving an action of debt on bills of exchange, was in force on the 11th of February, 1793. *Brown v. Barry*, 3 Dall. 365. 367.

242. The two subsequent acts of Assembly of Virginia, of November, 1792, declaring the repeal of the act of 1748, and of December, 1792, declaring a suspension of that repeal till October, 1793, did not repeal the act of 1748. *Ib.*

243. The repealing act of November, 1792, is not within the act of Assembly of 1789, which declares, that the repeal of a repealing act shall not revive the act first repealed. The suspension of an act for a limited time, is not a repeal of it: And the act of 1789, being in derogation of the common law, is to be taken strictly. *Ib.*

244. The repealing act of November, and the suspending act of December, 1792, (acts of the same session,) are, according to the English construction of statutes, and the rule which prevailed in Virginia, parts of the same act, and have effect from the same day: and taken together as parts of the same act, only

amount to a provision, that a repeal of the act of 1748 should take place at a day then future. *Brown v. Barry*, 3 Dall. 367.

245. The act of Assembly of Virginia of 1785, declaring the commencement of statutes to be from the day on which they in fact pass, did not apply to the above case; for, by the third section of the act of 1789, it is provided, that when a question shall arise, whether a law passed during any session, changes or repeals a former law passed during the same session, the same construction shall be made, as if the act of 1785 had never been passed—that is, both acts being of the same session, shall have the same commencement, on the first day of the session. *Ib.*

246. The suspending act of December, 1792, manifestly intended that the act of 1748, repealed by the repealing act of December, 1792, should continue in force till a day then future, the first of October, 1793. The intention of the Legislature, when discovered, must prevail, any rule of construction declared by previous acts to the contrary notwithstanding. *Ib.*

247. It is not the law of Virginia, that a suit by the holder of a promissory note, against the maker, is in all cases necessary, before resort can be had to the endorser. *Clark v. Young*, 1 Cranch, 181.

248. Under the statute of Virginia, which gives an action of debt on a protested bill of exchange, in these words, "It shall be lawful for any person or persons, having a right to demand any sum of money upon a protested bill of exchange, to commence and prosecute an action of debt, for principal, damages, interest, and charges of protest, against the drawers," &c. a declaration in debt upon a protested bill for the principal, interest, damages, and costs of protest, must aver the amount of the charges of protest. *Wilson v. Lenox*, 1 Cranch, 194.

249. The English statute of Anne, respecting promissory notes not being in force in Virginia, an endorsee cannot maintain an action of assumpsit against a remote endorser, for want of privity. *Mandeville v. Riddle*, 1 Cranch, 290.

250. The immediate endorser is liable, by the law of Virginia, to pay the contents of the note in the event of the insolvency of the maker. But, *quare*, as to the extent of his liability; whether he is responsible for the whole sum mentioned in the note, or only for so much as he received for it, provided he shall be able to prove the sum actually received? *Mandeville v. Riddle*, 1 *Cranch*, 298.

251. An endorser of a promissory note, payable to order, cannot, in Virginia, maintain an action *at law* upon the note against a remote endorser, but may maintain a suit in equity, and compel payment of the note. *Harris v. Johnston*, 3 *Cranch*, 311. 319. *Riddle v. Mandeville*, 5 *Cranch*, 322. 328.

252. The remote endorser has the same defence in equity against the remote endorsee as against his immediate endorsee; *Riddle v. Mandeville*, 5 *Cranch*, 322. 328.

253. The defendant, in such a case, has a right to insist that the other endorsers be made parties. *Ib.*

254. In Virginia, the endorser of a promissory note, who endorses it to give credit to the note, and who is countersecured by a pledge of property, is not liable to his immediate endorsee, in an action on the note, or for money had and received, unless the plaintiff show that the maker is insolvent, or that he has brought a suit against the maker, which has proved fruitless. It is not sufficient to show, that the maker is out of the reach of the process of the Court. *Ib.*

255. Under the act of Assembly of Virginia, which provides, that "assignments of bonds, bills, and promissory notes, and other writings obligatory, for payment of money or tobacco, shall be valid; and an assignee of any such may thereupon maintain an action of debt, in his own name, *but shall allow all just discounts*; not only against himself, but *against the assignor*, before notice of the assignment was given to the defendant," in an action by the assignee of a negotiable promissory note against the maker, the latter may set off a negotiable note of the assignor which he held at the time of receiving notice of the assignment of his own note, although the note thus set off was not due at

the time of the notice; but became due before the note upon which the suit was brought. *Stewart v. Anderson*, 6 Cranch, 203.

256 In an action of debt against the endorser of a bill of exchange, under the statute of Virginia, it is necessary that the declaration should aver notice of the protest for non-payment in the same manner as if the action was founded on the law merchant. *Slacum v. Pomery*, 6 Cranch, 221. 225.

(D) *Other local laws.*

257. After the first term next following an office judgment, for want of a plea in Virginia, it is a matter of mere discretion in the Court, whether it will set aside the writ of inquiry on such judgment in order to admit the defendant to file a special plea. *Basler v. Shahee*, 1 Cranch, 110.

258. The act of Assembly of Virginia, respecting fraudulent conveyances, does not comprehend absolute bills of sale among those conveyances, where the title may be separated from the possession, and yet the conveyance be valid if recorded within eight months. *Hamilton v. Russell*, 1 Cranch, 310. 316.

259. Proceedings before magistrates in cases of insolvent debtors, under the laws of Virginia, are matters *in pais*, and may be proved by parol evidence. *Turner v. Fendall*, 1 Cranch, 117. 132.

260. In Virginia, a *forthcoming bond* is an appendage to the original suit, or rather a component part of the proceedings. *Stuart v. Laird*, 1 Cranch, 299. 309.

261. A forthcoming bond, which in reciting the execution, states the costs to be 20 dollars instead of 12 dollars, is not thereby vitiated, if the aggregate of debt and costs be truly stated. *Williams v. Lyles*, 2 Cranch, 1.

262. In a deed, made in the year 1779, of lands, rendering an annual rent of 26 pounds *current money of Virginia* forever, the rents are not to be reduced by the scale of depreciation under the act of November, 1781, but the actual annual value of

the land at the date of the contract, in specie or in other money equivalent thereto, is to be ascertained by a jury. *Faw v. Marsteller, 2 Cranch, 10.*

263. In Virginia, if the first *ca. sa.* be returned *non est*, the second may include the costs of issuing both. *Payton v. Brooke, 3 Cranch, 92.*

264. A mortgage of personal property in Virginia is void, as to creditors and subsequent purchasers, unless it be acknowledged or proved by the oaths of three witnesses, and recorded in the same manner as conveyances of real property are required to be recorded. *Hodgson v. Butts, 3 Cranch, 140.*

265. A discharge from the prison rules under the insolvent act of Virginia, although obtained by *fraud*, is a discharge *by due course of law*; and upon such discharge no action can be sustained for an escape upon the *prison bounds bond*. *Sims v. Slacum, 8 Cranch, 380.*

266. If the owner of a slave removing into Virginia, take the oath required by the act of Assembly of the 17th of December, 1792, within sixty days after the removal of the owner, it will prevent the slave from gaining his freedom, although he was brought into Virginia by a person claiming and exercising the right of ownership over him eleven months before the removal of the true owner; and although the person who brought him in never took the oath; and although the slave remained in Virginia more than twelve months; and although the true owner never brought him in. *Scott v. Negro London, 3 Cranch, 324.*

267. An agent for the collecting of debts is not a *factor* within the 13th section of the statute of limitations of Virginia. *Hopkirk v. Bell, 3 Cranch, 454.*

268. The power of legislating for that part of the District of Columbia which was ceded by Virginia to the United States, remained in Virginia until it was exercised by Congress. *Young v. Bank of Alexandria, 4 Cranch, 384. 396.*

269. The act of Virginia, incorporating the Bank of Alexandria, is a public law. That part of it which deprives the debtors of the bank of the right of appeal is no longer in operation;

in the District of Columbia, the words of the act of Congress of the 27th of February, 1801, concerning the District of Columbia, giving a general right of appeal from the Circuit Court of the District, to the Supreme Court of the United States, where the matter in dispute exceeds the value of 100 dollars, and the saving clause of the act of Congress only preserving existing rights under the act incorporating the bank, which could only regulate those Courts established under the authority of Virginia, and would not affect the judicial proceedings of a Court of the United States or of any other State. *Young v. Bank of Alexandria*, 4 Cranch, 384. 396.

270. In Virginia, 1784, no gift of a slave was valid, unless in writing and recorded, although possession accompanied the gift. *Ramsay v. Lee*, 4 Cranch, 401.

271. If the owner of a slave permit her to remain in the possession of A. for four years; and A., without the assent of the owner, deliver her to B., who keeps her four years more, the possession of B. cannot be so connected with the possession of A., as to make it a fraudulent loan within the act of Assembly, in regard to B.'s creditor. *Auld v. Norwood*, 5 Cranch, 361.

272. A magistrate who has received a deed of trust from an insolvent debtor, which deed is fraudulent in law as to creditors, is incompetent to sit as a magistrate in the discharge of the debtor under the insolvent law of Virginia. The discharge so obtained is not a discharge by due course of law. *Slacum v. Simms*, 5 Cranch, 363. 367.

273. A schedule of property under the insolvent law in these words: "I have neither real or personal property but what has been conveyed by deed of trust to J. W. and P. W. jun. for the use of my creditors, as will appear, reference being had to said deed,"—is irregular and fraudulent; the insolvent not affirming directly that it is, or is not, his property. *Ib.*

274. A bond is not assignable, under the laws of Virginia; unless it be for a debt so certain as to render it unnecessary in an action upon the bond to assign breaches and call in a jury to assess the damages. *Lewis v. Harwood*, 6 Cranch, 82.

275. Under the act of Assembly of Virginia which is copied from the English statute of the 8 and 9 Will. III. c. 11. if the defendant die, after interlocutory judgment, and a writ of inquiry awarded, his administrator, upon *scire facias*, can only plead what his intestate could have pleaded. *McKnight v. Craig's administrator*, 6 Cranch, 183.

276. If two or more persons are sued in a joint action, in Virginia, and one or more of them is not served with process, the plaintiff may take out an *alias* and a *pluries capias*, or *testatum capias*, or, at his election, an attachment against the estate of such defendant; or, upon the return of a *pluries* not found, the Court may order a proclamation to issue, warning the defendant to appear on a certain day, and, if he failed to do so, judgment by default may be entered against him. *Barton v. Petit & Bayard*, 7 Cranch, 194. 201.

277. But the plaintiff cannot proceed to obtain a judgment against one defendant in a joint action against two, until he has proceeded against the other as far as the law will authorize, unless the law dispenses with the necessity of proceeding beyond a certain point to force an appearance. *Ib.*

278. Under the 14th section of the act of limitations of Virginia, a defendant who removes from one county of the State to another, is not thereby prevented from pleading the statute in bar, unless the plaintiff has been by such removal actually defeated or obstructed in bringing his action. *Wilson v. Koontz*, 7 Cranch, 202. 205.

279. The defendant to a foreign attachment under the statute of Virginia, may plead the act of limitations, without answering, and denying the debt, or averring it to be paid. The want of an answer, though constituting a valid objection in cases within the general and ordinary jurisdiction of a Court of Equity, yet is not such in this peculiar proceeding by attachment, which is substantially a case at law between the parties. *Ib.*

280. Upon executing a writ of inquiry, in Virginia, in an action upon a promissory note; it is necessary to produce a note corresponding with that stated in the declaration; but it is not

necessary to prove the execution of the note. *Shelby v. Mandeville*, 7 Cranch, 208. 218.

281. If the original judgment be reversed, the reversal of the judgment on the forthcoming bond follows of course; but a special *certiorari* is necessary to bring up the execution upon which the bond was given, so as to show the connexion between the two judgments. *Barton v. Petit*, 7 Cranch, 288.

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## MARSHAL.

1. The marshal is not liable for the escape of a debtor committed to the State jail under process from the Courts of the United States. *Randolph v. Donaldson*, 9 Cranch, 78. 95.

2. There is no provision, in any act of Congress, declaring the keepers of State jails, *quoad* prisoners in custody under process of the United States, to be deputies of the marshals, or making the latter liable for escapes committed by the negligence or malfeasance of the former. *Ib.*

3. Nor is this liability to be inferred from the general powers and duties of their office, or the doctrine of the common law applicable to the case of principal and agent. *Ib.*

4. When a prisoner is regularly committed to a State jail by the marshal, he is no longer in the custody of the marshal, nor controllable by him. *Ib.*

5. The marshal has no authority to command or direct the keeper in respect to the nature of the imprisonment. *Ib.*

6. In these respects, there is a manifest difference between the case of a marshal and a sheriff: the latter being the keeper of the County jail, and the jailer his deputy, appointed and removable at his pleasure. *Ib.*

7. If a marshal, before the date of his official bond, receive upon an execution money due to the United States, with orders

from the comptroller of the treasury to pay it into the bank of the United States, which he neglects to do, the sureties in his official bond, executed afterwards, are not liable therefor upon the bond, although the money remains in the marshal's hands after the execution of the bond. *United States v. Giles et al.* 2 Cranch, 212. 236.

8. The comptroller of the treasury has a right to direct the marshal to whom he shall pay money received upon execution, and a payment according to such directions is good; and it seems the marshal may avail himself of it upon the trial, without having submitted it as a claim to the accounting officers of the treasury. *Ib.*

## PARTNERSHIP.

1. If two joint owners of merchandize consign it for sale, informing the consignee that each owns one moiety; and if they give separate and variant instructions, each for his own moiety, it severs the joint interest, and one of the consignors alone may maintain a separate action against the consignee for a violation of his separate instructions in respect to the sale of the goods. *Hull v. Leigh*, 8 Cranch, 50.

2. One partner has a right to assign the partnership effects, in the name of the firm, by an instrument not under seal. *Harrison v. Sterry et al.* 5 Cranch, 289. 300.

3. He may assign the choses in action belonging to the partnership, by such an instrument, and equity will protect it as an equitable assignment. *Ib.*

## PAYMENT.

## PAYMENT.

1. If a debtor owing money on two several accounts, at upon bond and simple contract, does not elect, at the time a payment is made, to which account it shall be applied, the creditor may, at any time, apply it to which account he chooses. *Mayor, &c. of Alexandria v. Patten*, 4 Cranch, 317. 320.

2. If neither the debtor, nor the creditor, has made the application of the payments, the Court will apply them to the debts for which the security is most precarious. *Field v. Holland*, 6 Cranch, 8. 27.

3. The promissory note of the debtor, or of a third person, may, by agreement, be received in payment, and if thus received it extinguishes the original debt. *Sheehy v. Mandeville*, 6 Cranch, 253. 264.

4. But when a collector of revenue has given two bonds for his official conduct, at different periods, and with different sureties, a promise by the supervisor to apply his payments exclusively to the discharge of the first bond, some of the payments being for money collected and paid after the second bond was given, does not bind the United States, and does not amount to an application of the payments to the first bond. *United States v. January & Patterson*, 7 Cranch, 572. 575.

5. The general rule as to the application of different payments does not hold where the receiver is a public officer not interested in the event of the suit, and who receives on account of the United States, where the payments are indiscriminately made, and where different sureties, under distinct obligations, are interested. *Ib.*

6. A debtor to the United States, who puts the evidence of debts due to himself, into the hands of a public officer of the United States, to collect and apply the money when received, to the credit of such debtor in account with the United States, is

not entitled to such credit until the money gets into the hands of a public officer of the United States entitled to receive it. Its being in the hands of an agent of a person who, at the time when the claims were put into his hands for collection, was a public officer of the United States, entitled to receive debts due to them, but whose office became extinct before the money was received by his agent, is not sufficient to entitle such debtor to a credit in account with the United States theretofore. *United States v. Patterson*, 7 Cranch, 575.

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## PLEADING.

- I. *Parties to the suit.*
- II. *Declaration.*
- III. *Plead.*

### PLEADING I.

#### *Parties to the suit.*

1. In order to maintain any action in the Courts of the United States, it is necessary that the jurisdiction should appear upon the record. *Bingham v. Cabot*, 3 Dall. 382. *Turner v. Bank of North America*, 4 Dall. 8. *Turner's administrator v. Enrille*, 4 Dall. 7. *Mosman v. Higginson*, 4 Dall. 12. *Abercrombie v. Dupuis*, 1 Cranch, 343. *Wood v. Wagnon*, 2 Cranch, 1. *Capron v. Van Noorden*, 2 Cranch, 128.

2. As if the jurisdiction be founded on the citizenship of the parties, it should be averred that they are citizens of different States. *Bingham v. Cabot*, 3 Dall. 382. *Turner v. Bank of North America*, 4 Dall. 8. *Mosman v. Higginson*, 4 Dall. 12. *Abercrombie v. Dupuis*, 1 Cranch, 343.

3. So, if founded on the alienage of either party, it must be directly averred. *Turner's administrator v. Enrille*, 4 Dall. 7. *Mossman v. Higginson*, 4 Dall. 12.

4. An averment of residence or domicil, without an averment of citizenship or alienage, is not sufficient. *Bingham v. Cabot*, 3 Dall. 382. *Turner v. Bank of North America*, 4 Dall. 8.

5. An omission to state any residence or citizenship is equally fatal. *Capron v. Van Noorden*, 2 Cranch, 128.

6. So, if the action be on an endorsed note, it must be averred that the original parties were persons over whom the Court had jurisdiction, for otherwise jurisdiction is taken away by the 11th sec. of the judiciary act of 1789, c. 20. *Turner v. Bank of North America*, 4 Dall. 8. *Montalet v. Murray*, 4 Cranch, 46.

7. So, in a supplementary bill in equity, the citizenship, alienage, &c. must appear. *Course v. Stead*, 4 Dall. 22.

8. So, though the plaintiff be described as an alien, it is not sufficient unless the defendant be described as a citizen. *Hodgson v. Bowerbank*, 5 Cranch, 303.

9. And it must appear by sufficient averment, that *all the persons* on each side are entitled to sue in the Courts of the United States, if the action be joint and the interest joint. *Strawbridge v. Curtis*, 3 Cranch, 267. *Corporation of New-Orleans v. Winter*, 1 Wheat. 91.

## PLEADING II.

### *Declaration.*

10. In a declaration on a foreign bill of exchange for non-payment, no averment of a presentment for acceptance, or of a refusal and protest for non-acceptance of the bill, is necessary. *Brown v. Barry*, 3 Dall. 365.

11. If a bill be for foreign money, and its value be not averred in the declaration, a verdict will cure the defect. *Ib.*

12. So, if the declaration being for foreign money, be in the *dobet* and *detinet*, instead of the *detinet*. *Ib.*

13. A declaration in debt under the act of Virginia, respecting bills of exchange, for principal, interest, damages, and costs of protest, must aver the amount of such costs, otherwise it will be a fatal error. *Wilson v. Lenox*, 1 *Cranch*, 194.

14. Assumpsit will not lie on a sealed instrument. *Marine Ins. Co. v. Hodgson*, 1 *Cranch*, 332.

15. In a declaration, the averment, that the assignment of a promissory note was for value received, is an immaterial averment, and need not be proved. *Wilson v. Codman's executors*, 3 *Cranch*, 193.

16. It is not necessary that a breach of a covenant should be assigned in the very words of the covenant; it is sufficient to aver what is substantially a breach. *Fletcher v. Peck*, 6 *Cranch*, 87.

17. Oyer of a deed set forth in the first count, does not make the deed part of the record, so as to apply it to other counts in the declaration. *Hughes v. Moore*, 7 *Cranch*, 176.

18. In a count on the 50th section of the Revenue Act of the 2d of March, 1799, c. 123. it is not necessary to state the time or place of importation, nor the vessel in which it was made, but it is sufficient to state, that they were unknown to the District Attorney. *Locke v. United States*, 7 *Cranch*, 339.

### PLEADING III.

#### Pleas.

19. If the defendant plead the bankruptcy of the endorser in bar, a replication stating that the note was given to the endorser, in trust for the plaintiff, is good, and is not a departure from the declaration, which alleges the note to be for value received. *Wilson v. Codman's executors*, 3 *Cranch*, 193.

20. The want of oyer of the condition of a bond in a plea of performance is fatal. *United States v. Arthur*, 5 *Cranch*, 257.

21. Upon demurrer, the judgment must be against the party who commits the first error. *Ib.*

22. If a breach assigned of a covenant be, that the State had no authority to sell and dispose of lands, it is not a good plea, negativing the breach, that the *Governor* of the State was legally empowered to sell and convey the land. *Fletcher v. Peck*, 6 *Cranch*, 87.

23. In an action of covenant on a policy *under seal*, all special matter of defence must be pleaded. *Marine Ins. Co. v. Hedgeson*, 6 *Cranch*, 206.

24. In order to avoid the plea of the statute of limitations, it is necessary to show that *all the plaintiffs* were under a disability to sue within the exceptions of the statute. *Marsteller v. McClean*, 7 *Cranch*, 158.

25. If a declaration be on a joint note, and the defendant plead, that it is the separate note of one of the defendant's, and was accepted as satisfaction of a debt by the plaintiff, the plea is bad on demurrer, for it amounts to the general issue. *Van Ness v. Forrest*, 8 *Cranch*, 30.

26. A nominal plaintiff suing for the benefit of his assignee, cannot, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against a subsequent suit, for the same cause of action. *Welch v. Mandeville*, 1 *Wheat*. 233.

27. Variances between the writ and declaration; are matters pleadable in abatement only, and cannot be taken advantage of on a general demurrer to the declaration. *Duvall v. Craig*, 2 *Wheat*. 45.

28. No protest of a deed is necessary where it is only stated as inducement, and where the plaintiff is neither a party nor privy to it. *Ib.*

29. A plea in justification of a seizure for a forfeiture, should not only state the facts of forfeiture, but aver that thereby the property became forfeited, and was as such seized. *Hoyt v. Gelston*, 3 *Wheat*. 246.

30. A plea of forfeiture under the neutrality act of 1794, c. 50. need not aver by name the Prince or State, to cruise against which the vessel was fitted out. *Ib.*

31. To trespass for taking and detaining, and converting property, it is sufficient to plead a justification of the taking and detaining the property; and if the plaintiff relies on the conversion, he should reply it by way of new assignment. *Hoyt v. Gelston*, 3 Wheat. 246.

*Et vide Admiralty III.*

*Chancery VII.*

*Piæce X.*

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## POWER.

1. An officer selling lands for taxes, must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire whether he has so acted. *Stead's executors v. Course*, 4 Cranch, 403. 413. *Williams v. Peyton*, 4 Wheat. 77.

2. In such a case, full evidence of every minute circumstance ought not, especially at a distant day, to be required. In this case, as in all others depending on testimony, a sound discretion, regulated by the law of evidence, is to be exercised. But it is incumbent on the vendee to prove the authority to sell, and the question respecting the fairness of the sale will then stand on the same principles with any other transaction in which fraud is charged. *Stead's executors v. Course*, 4 Cranch, 403. 413.

3. In the case of a naked power, not coupled with an interest, the law requires that every pre-requisite to the exercise of that power should precede it. *Williams v. Peyton*, 4 Wheat. 77. 79.

## PRACTICE.

- I. General rules of practice.
- II. Jurisdiction.
- III. Value in dispute.
- IV. Process and appearance.
- V. Removal of causes from the State to the Circuit Court.
- VI. Revivor.
- VII. Abatement.
- VIII. Declaration and libel.
- IX. Amendments.
- X. Jury, trial, and verdict.
- XI. Deposition.
- XII. Default and inquest.
- XIII. Damages.
- XIV. Costs.
- XV. Writ of error and appeal. (A) On what a writ of error may be brought. (B) Mode of obtaining a writ of error; Proceedings and judgment in error. (C) Appeal.
- XVI. Hearing and rehearing.
- XVII. Mandamus and Prohibition.

## PRACTICE I.

*General rules of practice.*

1. This Court considers the practice of the King's Bench and Chancery, as affording outlines for its practice. *Anns.* 2 Dall. 411.
2. A Court may at any time reverse its interlocutory decree. *Ogle v. Lee, 2 Cranch, 33.*

## PRACTICE II.

*Jurisdiction.*

3. This Court will not take cognizance of any cause not brought regularly before it. *Dewhurst v. Coulhard*, 3 Dall. 409.

4. This Court has jurisdiction to bail a person committed on a criminal charge by the District Judge. *United States v. Hamilton*, 3 Dall. 17.

5. It seems doubtful if, under the 5th sec. of the judiciary act of 1789, c. 20. and the act of 1793, c. 167. [xxii.] this Court can appoint a special Circuit Court to try criminal causes at a distant period, to overleap the session of the stated Circuit Court. *Ib.*

6. And it seems that an indictment, found at such stated term, cannot be transferred to such special Circuit Court for trial. *Ib.*

7. A plaintiff may assign for error the want of jurisdiction of the Court to which he has chosen to resort. *Capron v. Van Noorden*, 2 Cranch, 128.

8. It is incumbent on the plaintiff in error to show that this Court has jurisdiction. *United States v. The Brig Union*, 4 Cranch, 216.

9. After a cause has been heard in this Court, and sent back on mandate, it is too late to question the jurisdiction of the Circuit Court over the parties. *Skilern's executors v. May's executors*, 6 Cranch, 267.

## PRACTICE III.

*Value in dispute.*

10. Where, as in a suit for dower, the value of the matter in controversy does not appear, this Court will admit affidavits to show the real value, in order to sustain their jurisdiction. *Williamson v. Kincaid*, 4 Dall. 20. *Course v. Stead*, 4 Dall. 22.

11. The appraisement of the property made by order of the Court below is not conclusive evidence of the value; but it is good evidence; and better than the opinion of a witness examined *viva voce*. *United States v. The Brig Union*, 4 Cranch, 216.

12. If the property be delivered to the claimant at an appraised value, this is the true value of the matter in dispute. *Ib.*

13. After deciding the question of value upon the evidence before it, the Court will not continue the cause to obtain new evidence. *Ib.*

14. In deciding on the value of the matter in dispute to sustain jurisdiction, this Court will look to the sum due upon the condition of the bond in dispute, and not to the penalty only. *United States v. McDowell*, 4 Cranch, 316.

15. If the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute; but where the judgment below is for the defendant, this Court has not fixed the mode of ascertaining the value. *Cooke v. Woodrow*, 5 Cranch, 13.

16. This Court will give time to procure affidavits as to the value of the matter in dispute to support its jurisdiction. *Rush v. Parker*, 5 Cranch, 287.

17. This Court will permit *viva voce* evidence to show the value of the matter in dispute to sustain its jurisdiction. *United States v. The Brig Union*, 4 Cranch, 216.

18. If the sum awarded by a decision of the Circuit Court of Columbia, against the plaintiff in error, be less than 100 dollars, the sum awarded is the matter in dispute so far as respects the plaintiff in error, although the other party may have originally claimed a larger sum. *Wise, &c. v. Columbian Turnpike Company*, 7 Cranch, 276.

## PRACTICE IV.

*Process and appearance.*

19. This Court will rule the marshal of a District to return process directed to him for service; and in case of his default, require him to show cause by affidavit. *Oswald v. State of New-York*, 2 *Dall.* 402.

20. Before the 11th amendment to the Constitution of the United States, in case a State was the defendant, and refused to appear, this Court granted a rule to show cause, why, on non-appearance of the State, judgment should not be entered by default against the State. *Oswald v. State of New-York*, 2 *Dall.* 415. *Chisholm v. State of Georgia*, 2 *Dall.* 419.

21. Where, in a suit against a State, process has been duly served, and the State neglected to appear, this Court will proceed *ex parte*. *Huger v. South Carolina*, 3 *Dall.* 339.

22. Where a citation has not been served thirty days before the sitting of this Court, the Court will not take up the cause until the thirty days have expired, unless the defendant in error shall appear. *Lloyd v. Alexander*, 1 *Cranch*, 365.

23. Where there is no appearance for the plaintiff in error in this Court, the defendant may have the plaintiff called and dismiss the writ of error, or may open the record and pray for an affirmance; and in such case costs go of course. *Montalet v. Murray*, 3 *Cranch*, 249.

24. Where a writ of error is served when in full force, and the writ is returned, though not at the first term, the appearance of the defendant in error waives all objection to the irregularity of the return. *Wood v. Lide*, 4 *Cranch*, 180.

25. The appearance of the defendants to a foreign attachment in a Circuit Court of the United States, in a circuit where they do not reside, is a waiver of all objections to the non-service of process on them. *Pollard v. Dwight*, 4 *Cranch*, 421.

26. If two or more persons are sued in a joint action, the plaintiff cannot proceed to obtain a judgment against one alone, but must wait until the others have been served with process, or have been proceeded against as far as the law authorizes for the purpose of compelling an appearance. *Barton v. Petit & Bayard*, 7 *Cranch*, 194.

27. An appearance by the defendant cures all antecedent irregularity of process. *Knox v. Summers*, 3 *Cranch*, 496.

28. The marshal of the United States in Connecticut, upon a writ of attachment sued out by the United States, to recover a penalty, may commit a defendant to prison, for want of bail, without a mittimus from a State magistrate, as is required by the local laws of Connecticut, for such municipal regulation does not bind the officers of the United States. *Palmer v. Allen*, 7 *Cranch*, 550.

#### PRACTICE V.

##### *Removal of causes from the State to the Circuit Court.*

29. Where a cause is wrongfully removed to the Circuit, that Court may remand it to the State Court. *Pollard v. Dwight*, 4 *Cranch*, 421.

#### PRACTICE VI.

##### *Revivor.*

30. Under the 31st section of the judiciary act of 1789, c. 20, authorizing executors, &c. to be made parties where the original parties die pending the suit, it is not necessary to sue out a *scire facias*, if the executor, &c. voluntarily comes in and becomes a party. And the other party is not, in such case, entitled to a continuance of course. *Wilson v. Codman's executors*, 3 *Cranch*, 193.

31. Before an executor is admitted such a party, the other

party may require the production of his letters testamentary. *Wilson v Codman's executors*, 3 Cranch, 193.

32. Where a plaintiff dies pending a suit, and the suit is revived by his administratix by *scire facias*, and then she marries, and the fact is pleaded *puis darrein continuance*, and the *scire facias* is thereby abated, a new *scire facias* may issue in the name of husband and wife, administratix, under the judiciary act of 1789, c. 20. s. 31. *M'Coul v. Lecamp*, 2 Wheat. 111.

33. At common law, all suits abate by the death or marriage of a plaintiff, if a feme sole, and could not be prosecuted by her representative, or by husband and wife. The judiciary act of the 24th of September, 1789, c. 20. s. 31. provides for the death of a party, but not for the case of marriage; this case remains, therefore, as at common law. *Ib.*

34. But by the judiciary act of the 24th of September, 1789, c. 20. s. 31. a suit does not abate by the death of a party, if by law the action may survive; but it continues on the docket to be prosecuted to judgment, when proper parties are brought before the Court. *Ib.*

## PRACTICE VII.

### *Abatement.*

35. The commencement of another suit for the same cause of action in the Court of another State since the last continuance, cannot be pleaded in abatement of the original suit. *Renner v. Marshall*, 1 Wheat. 215.

36. If matter in abatement be pleaded *puis darrein continuance*, the judgment, if against the defendant, is peremptory, and not a *respondeat ouster*. *Ib.*

## PRACTICE VIII.

*Declaration and libel.*

37. A fault in the declaration, which would have been good in arrest of judgment, is fatal in error. *Slacum v. Pomeroy, 6 Cranch, 221.*

38. A plaintiff may, before verdict, discontinue any count in his declaration, and waive the issues joined thereon. *Hughes v. Moore, 7 Cranch, 176.*

39. A libel or information for a forfeiture, may allege the offence in the alternative of several facts, if each alternative constitute a substantive offence and cause of forfeiture ; otherwise such alternative allegation is bad. *The Caroline v. United States, 7 Cranch, 496. and note in the Errata of the same volume.*

## PRACTICE IX.

*Amendments.*

40. The return day of a writ of error may be amended, as by filling a blank, if there be any thing to amend by. *Mossman v. Higginson, 4 Dall. 12.*

41. The teste and direction of a writ of error may be amended, if there be any thing to amend by. *Course v. Stead, 4 Dall. 22.*

42. The Circuit Courts have power to allow amendments after a cause has been remanded by this Court. *Pollard v. Dwight, 4 Cranch, 421.*

43. Amendments are matters of discretion ; but cases may arise where a Court is not at liberty to grant amendments, or refuse them without control. *Mandeville v. Wilson, 5 Cranch, 15.*

44. The refusal to allow an amendment of a plea, is not matter for a writ of error. *Moss v. Riddle, 5 Cranch, 351.*

45. After the cause is remanded on mandate by this Court, the Court below may receive additional pleas, or admit amendments to those already filed, even after the Appellate Court has decided those pleas to be bad upon demurrer. *Marine Ins. Co. v. Hodgson*, 6 *Cranch*, 206.

46. This Court will not, in general, direct the Court below to allow the proceedings to be amended, but will leave it to the discretion of that Court. *Sheehy v. Mandeville*, 6 *Cranch*, 253.

47. But where a libel for a forfeiture is so informal and incorrect, that the Court cannot enter up a decree upon it, and the evidence discloses a case of forfeiture, this Court will remand the cause to the Court below, with directions to allow it to be amended. *The Caroline v. United States*, 7 *Cranch*, 496. *The Anne v. United States*, 7 *Cranch*, 570. *The Adeline*, 9 *Cranch*, 244. *The Edward*, 1 *Wheat.* 261. *The Divina Pastora*, 4 *Wheat.* 52.

#### PRACTICE X.

##### *Jury, trial, and verdict.*

48. Jurors in civil cases attending the Circuit Court are entitled to one dollar and twenty-five cents for each day's attendance. *Ex parte Lewis, &c.* 4 *Cranch*, 433.

49. The Court upon a trial by jury are bound to give an opinion, if required, upon any point relevant to the issue. *Douglas, &c. v. M'Allister*, 3 *Cranch*, 298. *Smith v. Carrington*, 4 *Cranch*, 62.

50. The Court on a jury trial is not bound to give an opinion on the truth of testimony in any case. *Smith v. Carrington*, 4 *Cranch*, 62.

51. The Court is not bound to give an opinion to the jury as to the meaning or construction of a deposition read in evidence. *Marine Ins. Co. v. Young*, 5 *Cranch*, 187.

52. If the facts stated in a special plea do not amount in law to a justification, yet if issue be joined on the plea, and the facts are proved as stated, it is error for the judge to instruct the

jury that the facts so proved do not in law maintain the issue. *Otis v. Watkins*, 9 *Cranch*, 339.

53. A note, payable at sixty days, cannot be given in evidence to support a count upon a note, which count does not state when the note was payable. *Sheehy v. Mandeville*, 7 *Cranch*, 208. 217.

54. The plaintiff cannot, in such a case, give in evidence that the variance was the effect of mistake or inadvertence of the attorney, and that the note produced was that which was intended to be described in the declaration. *Ib.*

54. A verdict is bad if it varies from the issue in a substantial matter, or only find part of the issue. *Patterson v. United States*, 2 *Wheat.* 221.

56. A verdict will not cure a mistake in the nature of the action. *Marine Ins. Co. v. Hodgson*, 1 *Cranch*, 332.

57. After a verdict in assumpsit, every promise is to be taken to be an express assumpsit. *Marine Ins. Co. v. Young*, 1 *Cranch*, 332.

58. After a juror is sworn, it is too late to object that he belongs to another county. *Mima Queen v. Hepburn*, 7 *Cranch*, 290.

59. If a juror be challenged for favour, and upon examination before the triors, he declare that if the evidence should be equal, he would give a verdict in favour of the party upon whom the burthen of proof lies, the Court in its discretion ought to reject him as a juror. *Ib.*

60. A verdict "for the defendant, subject to the opinion of the Court upon the points reserved," does not authorize an absolute judgment for the defendant, unless the points reserved appear on the record, and justify the judgment. *Smith v. Delaware Ins. Co.* 7 *Cranch*, 434.

61. Upon the issue of *plene administravit*, the jury must find specially the amount of assets in the hands of an executor, otherwise no judgment can be rendered on the verdict. *Fairfax's executor v. Fairfax*, 5 *Cranch*, 19.

62. Where a verdict in favour of the plaintiff is reversed by

this Court, on a bill of exceptions to instructions to the jury, there must be a new trial awarded by the Court below. *Hudson v. Guestier*, 6 Cranch, 281.

63. A bill of exceptions should state that evidence was offered of the facts, upon which an opinion of the Court was prayed, *Vasse v. Smith*, 6 Cranch, 228.

64. It is matter of discretion in a Court, whether it will compel a party to join in a demurrer to evidence. *Young v. Black*, 7 Cranch, 565.

65. A demurrer to evidence ought not to be admitted where the party demurring refuses to admit the facts which the other side attempts to prove; nor where he offers contradictory evidence, or attempts to establish propositions inconsistent with the evidence on the other side. *Ib.*

## PRACTICE XI.

### *Depositions.*

66. Depositions in cases pending in this Court, can be taken only under a commission. The 30th section of the judiciary act of 1789, c. 20. does not apply to this Court. *The Argo*, 2 Wheat. 287. *The London Packet*, 2 Wheat. 372.

67. This Court will not award a commission to a foreign country to take testimony, without the commissioners being named. *Van Staphorst v. State of Maryland*, 2 Dall. 401.

68. Depositions taken under a *de dimis potestatem*, according to common usage, under the proviso of the 30th section of the judiciary act of 1789, c. 20. are not, under any circumstances, to be considered as taken *de bene esse*, but are evidence in chief, and absolutely, whether the witnesses reside beyond the process of the Court, or within it. *Sergeant v. Biddle*, 4 Wheat. 508.

69. If a party would object to the commission, he must do it at the time when it is granted. If he joins in the commission, it is too late to object to the regularity of issuing it. *Ib.*

70. It is a fatal objection to a deposition taken under the 30th

section of the judiciary act of the 24th of September, 1789, c. 20, that it was opened out of Court. *Beale v. Thompson*, 8 Cranch, 70.

## PRACTICE XII.

*Default and inquest.*

71. Where, by the State laws and practice, upon a default, damages may be assessed for the plaintiff by the Court, the Circuit Court may, under the 34th section of the judiciary act of 1789, c. 20, adopt the like practice. *Brown v. Van Braam*, 3 Dall. 344.

## PRACTICE XIII.

*Damages.*

72. Where a judgment or decree on a writ of error, under the judiciary act of 1789, in an Admiralty suit, is affirmed, this Court will not allow damages but for the delay. *Cotton v. Wallace*, 3 Dall. 302.

73. On a libel for restitution of the captured vessel, the Circuit Court dismissed the suit, and awarded *damages* to the *captors* for the delay, &c.; and among others, included a charge of 1,600 dollars for counsel fees; this Court disallowed this item, declaring the general practice of the United States to be in opposition to it, and if that practice were not strictly correct in principle, it was entitled to respect until changed or modified by statute. *Archambel v. Wiseman*, 3 Dall. 306. and MSS.

74. Where the action is brought for a sum certain, or which may be made certain by computation, as on a bill of exchange, judgment for the damages may be entered up by the Court without a writ of inquiry. *Renner v. Marshall*, 1 Wheat. 215.

75. An agreement on the record in the Court below, stating the damages to be allowed on certain alternatives, will not be re-

garded by this Court on a writ of error, but the Court will award a *venire facias de novo* to assess them. *Lanusse v. Barker*, 3 Wheat. 101.

## PRACTICE XIV.

## Costs.

76. The Court below is always competent to award costs in a Chancery suit in that Court; and in case the cause has been sent back from this Court on a mandate, without any thing being said as to costs of the Court below, it may still award costs, and issue execution therefor. *Riddle v. Mandeville*, 6 Cranch, 86.

77. In all cases of reversal, if this Court direct the Court below to enter judgment for the plaintiff in error, the Court below will, of course, enter the judgment, with the costs of that Court. *M'Knight v. Craig's administrators*, 6 Cranch, 183.

78. Costs will be allowed upon the dismission of a writ of error for want of jurisdiction, the parties not appearing on record to be citizens of different States, the original defendant being also defendant in error. *Winchester v. Jackson*, 3 Cranch, 514. Contra, *Montalet v. Murray*, 3 Cranch, 46.

79. The United States never pay costs in any suit. *United States v. Barker*, 2 Wheat. 395.

80. Each party is liable to the clerk of this Court for the fees due by such party, and it is immaterial which party recovers judgment. *Caldwell v. Jackson*, 7 Cranch, 276.

## PRACTICE XV.

*Writ of error and appeal.* (A) *On what a writ of error may be brought.* (B) *Mode of obtaining a writ of error: Proceedings and judgment in error.* (C) *Appeal.*

(A) *On what a writ of error may be brought.*

81. No writ of error lies under the judiciary act of 1789, c. 20. s. 22. to this Court, for any error of fact. *Penhallow v. Doane*, 3 Dall. 54.

82. Where a judgment, though informal and defective, is yet a judgment on which an execution could issue, the party injured is entitled to his writ of error. *Wilson v. Daniel*, 3 Dall. 401.

83. A writ of error lies only from the final judgment of the Circuit Court, under the judiciary act of 1789, c. 20. *Rutherford v. Fisher*, 4 Dall. 22.

84. Where a point is certified upon a division of the Court below, under the judiciary act of 1802, c. 291. [xxxi.] this Court will consider that question only; but the parties will not be precluded from bringing a writ of error upon the final judgment below, and the whole cause will then be before the Court. *Ogle v. Lee*, 2 Cranch, 33.

85. The refusal of the Court below to continue a cause after it is at issue, is not matter upon which error can be assigned. *Wood v. Young*, 4 Cranch, 237.

86. The refusal of the Court below to grant a new trial is not matter for which a writ of error lies. *Henderson v. Moore*, 5 Cranch, 11. *Marine Ins. Co. v. Young*, 5 Cranch, 197. *Barr v. Gratz*, 4 Wheat. 213.

87. It is no ground for a writ of error, that the Court below refused to reinstate a cause after a nonsuit. *United States v. Evans*, 5 Cranch, 280. *Welch v. Mandeville*, 7 Cranch, 152.

88. The refusal of the Court below to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to

continue a cause, cannot be assigned as a cause of reversal on a writ of error. *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206.

89. An application to allow several pleas in a writ of right, is an application to the discretion of the Court, and is not matter of error if refused. *Liter v. Green*, 2 Wheat. 306.

90. The time and manner of filing pleadings must always be left to the discretion and established rules and practice in the Circuit Courts: *Ib.*

91. No appeal or writ of error lies in a *criminal* case from the judgment of the Circuit Court of the District of Columbia to this Court. *United States v. Moore*, 3 Cranch, 159.

92. Nor has this Court any jurisdiction, in a *civil* or criminal case, brought before it upon a certificate of division of opinions of the judges of the Circuit Court of Columbia. *Ross v. Triplet*, 3 Wheat. 600.

93. Error lies to this Court on a general verdict given, subject to the opinion of the Court, upon a statement of facts on the record. *Faw v. Roberdeau's executor*, 3 Cranch, 174. *Fueseer v. Oxley*, 5 Cranch, 34. *Brent v. Chapman*, 5 Cranch, 358.

94. No writ of error lies to a State Court, under the 25th section of the judiciary act of 1789, c. 20. unless there is something apparent on the record bringing the case within the jurisdiction of the Court under that section. *Inglee v. Coolidge*, 2 Wheat. 363. *Miller v. Nichols*, 4 Wheat. 311.

95. The report of a judge of the facts to found a motion for a new trial, is no part of the record, where there is a general verdict without reference to such facts. *Inglee v. Coolidge*, 2 Wheat. 363.

96. But on a writ of error to a State Court, under the 25th section of the judiciary act of 1789, c. 20. it is not necessary that the record should, in terms, state a misconstruction of the act of Congress, &c. or that it is drawn in question. It is sufficient to give this Court jurisdiction, that the record should show that an act of Congress was applicable to the case. *Miller v. Nichols*, 4 Wheat. 311.

97. It is not error for which a decree may be reversed,

that the Circuit Court omitted to make a statement of facts according to the 19th section of the judiciary act of 1789. *Hills v. Ross*, 3 Dall. 184. *Jennings v. The Perseverance*, 3 Dall. 336.

98. A writ of error lies only from a final judgment of the Circuit Court. Therefore it lies not, under the judiciary act of 1789, c. 20. from a decree on a bill in equity overruling a plea, and ordering the defendant to answer the bill. *Rutherford v. Fisher*, 4 Dall. 22.

99. Under the judiciary act of 1789, c. 20. the removal of suits from the Circuit Court into this Court, must be by writ of error in every case, whatever may be the original nature of the suits. *Blaine v. Ship Charles Carter*, 4 Dall. 22.

But this is now altered by statute of the 3d of March, 1803, c. 353. [xciii.] in equity and admiralty causes.

(B) *Mode of obtaining a writ of error: Proceedings and judgment in error.*

100. On a writ of error, brought under the 22d section of the judiciary act of 1789, c. 20. the original writ of error awarded, and the original citation subscribed by the judge allowing the writ, must be returned to this Court. *Wilson v. Daniel*, 3 Dall. 401.

101. A citation must be served and accompany a writ of error under the 22d section of the judiciary act of 1789, c. 20. otherwise the writ will be quashed. *Lloyd v. Alexander*, 1 Cranch, 365. *Bailiff v. Tipping*, 2 Cranch, 406.

102. If the defendant below intermarries after the judgment, and before service of the writ of error, the service of the citation should be on her husband. *Fairfax's executor v. Fairfax*, 5 Cranch, 19.

103. If a writ of error be served after the return day, the service is void; but if served while in force, a return afterwards is good. *Wood v. Lide*, 4 Cranch, 180.

104. The service of a writ of error is the lodging a copy thereof for the adverse party, in the office of the clerk of the

Court, where the judgment was rendered by the judiciary act of 1789, c. 20. s. 23. *Wood v. Lide*, 4 *Cranch*, 180.

105. The return of a copy of the record under the seal of the Court, certified by the clerk, and annexed to a writ of error, is a sufficient return to the writ of error. *Martin v. Hunter*, 1 *Wheat.* 305.

106. It need not appear that the judge who granted the writ of error did, upon issuing the citation, take a bond, as required by the 22d section of the judiciary act of 1789, c. 20.; the provision is merely directory, and the presumption of law is, that it is complied with, unless the contrary appears. S. C. 1 *Wheat.* 304.

107. A writ of error must bear teste of the term next preceding that to which it is returnable; and a term must not intervene between the teste and the return. *Hamilton v. Moore*, 3 *Dall.* 371.

108. A writ of error issued in September, may bear teste of the preceding February term of this Court, and may be returnable to the next February term, notwithstanding the intervention of the August term. *Blackwell v. Patten*, 7 *Cranch*, 277.

109. This Court will not quash a *habere fac. possessionem*, to enforce a decree issued by the Court below, pending the writ of error, if the writ of error be not a *supersedeas*. *Walten v. Williams*, 7 *Cranch*, 278. But see S. C. 7 *Cranch*, 602.

110. A writ of error is a nullity if not returned to the term of the Court to which it is returnable. *Blair v. Miller*, 4 *Dall.* 21.

111. It is not necessary that the transcript of the record should contain the names of the jurors who tried the cause. *Owens v. Hannay*, 9 *Cranch*, 180.

112. A *certiorari* will be awarded by this Court, upon a suggestion that a citation has been served and not returned. *Field v. Milton*, 3 *Cranch*, 514.

113. Writs of error to remove causes from inferior Courts to this Court, under the judiciary act of 1789, c. 20. can regularly issue only from the clerk's office of that Court. *West v. Barnes*, 2 *Dall.* 401.

But this is now altered by the act of the 8th of May, 1782, c. 137. [xxxvi.] s. 9. allowing such writs to issue from the Circuit Courts.

114. Upon a writ of error in an Admiralty suit under the judiciary act of 1789, c. 20. this Court is not bound by the common law doctrine as to writs of error, but may reverse or affirm the decree in whole or in part ; and may, in its discretion, apportion the costs of the Circuit Court, and order the parties to pay their own costs in this Court. *Penhallow v. Doane*, 3 Dall. 54.

115. The rule to dismiss a writ of error for not filing the record within the first six days of the term, does not apply to cases where the record is filed before the motion is made to dismiss. *Bingham v. Morris*, 7 Cranch, 99.

116. If causes of Admiralty and Maritime jurisdiction are removed into this Court by writ of error, under the judiciary act of 1789, c. 20. accompanied with a state of facts pursuant to the 19th section of that act, (since repealed,) but without the evidence, it is well ; and the statement is conclusive as to all the facts which it contains. *Wiscart v. Dauchy*, 3 Dall. 321.

117. If such causes are removed with a statement of the facts, and also with the evidence, still the statement is conclusive as to all the facts contained in ~~it~~. *Ib.*

118. Where this Court reverses a judgment because a Court of common law has not jurisdiction of the cause, it will not award a *venire facias de novo*. *Bingham v. Cabot*, 3 Dall. 19.

#### (C) Appeal.

119. Since the act of the 3d of March, 1803, c. 353. [xciii.] causes of Admiralty and Maritime jurisdiction cannot be removed from the Circuit Court to this Court on a *writ of error*, but only by an *appeal* ; but the removal must be under the same rules, and regulations, and restrictions, as writs of error under the judiciary act of the 24th of September, 1789, c. 20. unless where the appeal is prayed at the same term in which the decree is pronounced, when a citation becomes unnecessary. *The San Pedro*, 2 Wheat. 132.

120. No appeal lies from an interlocutory decree dissolving an injunction. *Young v. Grundy*, 6 *Cranch*, 51.

121. A decree for the sale of mortgaged property, upon a bill to foreclose, is a *final decree*, from which an appeal lies to the Supreme Court. *Ray v. Law*, 3 *Cranch*, 179.

122. In this Court, on an appeal by the claimant from the Circuit Court on a libel for salvage, the Court will not award a greater salvage, unless the salvors have also appealed. *M'Donough & Dallery v. The Mary Ford*, 3 *Dall.* 198.

## PRACTICE XVI.

### *Hearing and rehearing.*

123. If no counsel appear on either side when the cause is called, the writ of error will be dismissed. *Radford v. Craig*, 5 *Cranch*, 289.

124. This Court will not compel a cause to be heard, unless the citation has been served thirty days before the first day of the term. *Welsh v. Mandeville*, 5 *Cranch*, 321.

125. Unless statements of the case are furnished to this Court, pursuant to their rules, the causes will be either dismissed or continued. *Peyton v. Brooke*, 3 *Cranch*, 92.

126. If the appellant's counsel neglect to furnish this Court with a statement of the points pursuant to the rule of the Court, the appeal will be dismissed. *The Catharine v. United States*, 7 *Cranch*, 99.

127. This Court will, in its discretion, continue a cause on account of the death of counsel. *Hunter v. Fairfax's devisee*, 3 *Dall.* 306.

128. This Court will not rehear a cause after the term in which it is decided. *Anon.* 7 *Cranch*, 1.

129. This Court will not hear more than two counsel on one side, whatever may be the number of points in a cause. *Ib.*

130. This rule has been dispensed with in a cause of great public importance, where the sovereign rights of the United

States and a State were involved, and the Government of the United States had directed the Attorney General to appear for one of the parties. *McCulloch v. State of Maryland*, 4 Wheat. 316. 322. Note a.

## PRACTICE XVII.

*Mandamus and Prohibition.*

131. Where the District Judge acts in a judicial capacity, as in deciding upon the propriety of issuing a warrant, this Court will not grant a *mandamus* to compel him to decide according to the dictates of any judgment but his own. *United States v. Lawrence*, 3 Dall. 42.

132. It seems, that a *mandamus*, in the nature of a *procedendo*, is the proper remedy, where the Court below orders a final stay of proceedings upon suggestion of the Attorney of the United States, in a case in which the United States are not a party. *Livingston v. Dorgenois*, 7 Cranch, 577.

133. This Court will issue a prohibition to the District Court, where it is proceeding in an Admiralty suit, of which it has no jurisdiction; as in case of a prize lawfully captured by a belligerent on the high seas. *United States v. Peters*, 3 Dall. 121.

*Et vide ADMIRALTY III.*

*CHANCERY VII.*

*COURTS OF THE UNITED STATES.*

*EJECTMENT.*

*LOCAL LAW.*

*MARSHAL.*

*PLEADING.*

*PRIZE X.*

*WRIT OF RIGHT.*

## PRIZE.

- I. *Jurisdiction of the Prize Court.*
- II. *Authority to capture, and exemption from capture.*
- III. *Questions of proprietary interest, and freight.*
- IV. *Domicil and national character.*
- V. *Liability to capture for navigating under the enemy's license.*
- VI. *Contraband, blockade, and resistance of visitation and search.*
- VII. *Trade with the enemy, and breach of municipal law.*
- VIII. *Ransoms, recapture, and salvage..*
- IX. *Treaty of peace.*
- X. *Practice of the Prize Court.*

## PRIZE I.

*Jurisdiction of the Prize Court.*

1. Every District Court in the United States possesses all the powers of a Court of Admiralty, whether considered as an Instance or a Prize Court. *Glass et al. v. The Betsey*, 3 Dall. 6. 16. *Penhallow v. Doane*, 3 Dall. 97.
2. By the law of nations, the trial of prizes taken on the high seas, without the territorial limits and jurisdiction of a neutral State, and brought within the jurisdiction of the belligerent power, for legal adjudication, by vessels of war belonging to the sovereignty of such power, acting under the same; and of all questions incidental thereto; belongs to the Courts of such power, and to no other tribunals whatsoever. *The United States v. Peters*, 3 Dall. 121. 129.
3. The commander of a French privateer, called *The Citizen Genet*, having captured as prize on the high seas, the sloop Bet-

sey, sent the vessel into the port of Baltimore, (the United States being then neutral;) and upon her arrival there, the owners of the sloop and cargo filed a libel in the District Court of Maryland, claiming restitution, because the vessel belonged to subjects of Sweden, a neutral power, and the cargo was owned jointly by Swedes and by citizens of the United States. *Held*, that the District Court of Maryland had jurisdiction competent to inquire, and to decide, whether in such case, restitution ought to be made to the claimants, or either of them, in whole or in part; that is, whether such restitution could be made consistently with the law of nations, and the treaties and laws of the United States. *Glass et al. v. The Betsey*, 3 Dall. 6. 16.

4. The only point settled in the above case of *Glass v. The Betsey*, (3 Dall. 6.) was that the Courts of the neutral country have jurisdiction of captures made in violation of its neutrality; and the case was sent back with a view that the District Court should exercise jurisdiction, subject, however, to the law of nations on that subject, as the rule to govern its decision. *L'Invincible*, 1 Wheat. 257.

5. No foreign power can of right institute, or erect, any Court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of, treaties; the Admiralty jurisdiction which had been exercised in the United States by the consuls of France, in the beginning of the war of 1793, not being so warranted, was not of right. *Glass v. The Betsey*, 3 Dall. 6. 16.

6. The District Courts of the United States have no jurisdiction on a libel for damages for the capture of a vessel, as prize, by the commissioned cruiser of a belligerent power; although the captured vessel is alleged to belong to citizens of the United States, and although the capturing vessel and her commander be found and proceeded against within the jurisdiction of the Court; the captured vessel having been carried *infra praesidia* of the captors. *The United States v. Peters*, 3 Dall. 121.

7. The capture of a vessel from a belligerent power, by a

citizen of the United States, (when neutral,) under a commission from another belligerent power, (though the captor sets up an act of expatriation, not carried into effect by a departure from the United States, with an intention to settle permanently in another country,) is an unlawful capture, and the Courts of the United States will decree restitution. *Talbot v. Janson, 3 Dall. 133. 153. 164.*

8. A capture, by a citizen of a neutral State, who sets up an act of expatriation to justify it, is unlawful, where the removal from his own country was by sailing, *cum dolo et culpa*, in the capacity of a cruiser against friendly powers. *Ib.*

9. *Quære,* Whether a citizen of the United States, expatriating himself according to the law of a particular State of the Union, of which he is also a citizen, can be considered as having lost the character of a citizen of the United States, so as to be authorized to capture under a foreign commission the property of powers in amity with the United States? *Ib.*

10. A capture by a vessel built, owned, and fitted out as a vessel of war in a neutral country, is unlawful; and restitution of the property captured will be decreed by the Courts of the neutral country. *Ib.*

11. Every illegal act committed on the high seas, does not amount to piracy. A capture, although not piratical, may be illegal, and of such a nature as to induce the Court to award restitution. *Ib.*

12. A capture made by a lawfully commissioned belligerent cruiser, through the medium and instrumentality of a neutral, who had no right to cruise, is unlawful, and the property captured will be restored by the neutral State, being brought within its jurisdiction. *Ib.*

13. The exemption from inquiry, by neutral Courts, into belligerent captures on the high seas, only belongs to a belligerent vessel of war, *lawfully commissioned*, and if a vessel claims that exemption, it is the duty of the Court, upon application, to make inquiry, whether she is the vessel she pretends to be. *Ib.*

14. If, upon such inquiry, it appears, that the vessel pretend-

ing to be a lawful cruiser, is really not such, but uses a colourable commission for the purpose of plunder, she is to be considered by the law of nations, so far at least as the title of property or right of possession is concerned, in the same light as having no commission at all. *Talbot v. Janson*, 3 *Dall.* 133. 153. 164.

15. *Prima facie*, all piracies and trespasses committed against the general law of nations, are inquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it. *Per IREDELL, J.* *Talbot v. Janson*, 3 *Dall.* 160.

16. Where a vessel belonging to one belligerent was captured by another belligerent, and being abandoned on the high seas by the captors, to avoid the necessity of weakening their force by manning the prize, was found and taken possession of by citizens of the United States, (then neutral,) brought into a port of this country, and libelled in the District Court for salvage: *Held*, that the District Court had jurisdiction upon the subject of salvage, and, consequently, a power of determining to whom the residue of the property, after payment of salvage, ought to be delivered. *M'Donough & Dallery v. The Mary Ford*, 3 *Dall.* 188. 198.

17. In the above case, the captors acquired, immediately on the capture, such a right as no neutral nation could justly impugn or destroy; and it could not be said by the Court, that the abandonment of the captured vessel revived the interest of the original proprietors. *Ib.*

18. In the same case, one third the value of the property was decreed to the neutral salvors, and the residue restored to the captors. *Dubitatur*, Whether on account of the abandonment by the captors, the whole property, or a greater salvage, ought not to have been decreed to the neutral salvors. But as they had not appealed from the decision of the inferior Court, this Court held, that it could not take notice of their interest in the cause. *Ib.*

19. The District Courts of the United States have jurisdiction

over captures made by foreign vessels of war, of the property of other nations, with whom the United States are at peace, where such vessels are equipped in this country in breach of our neutrality. *Talbot v. Janson*, 3 Dall. 133. *Moodie v. The Betsy Cathcart*, *Id.* 288. Note.

20. Where the vessel which captured the prize in question had been built in the United States, (then neutral,) with the express view of being employed as a privateer, in case the then existing differences between Great Britain and the United States should terminate in war; some of her equipments were calculated for war, though frequently used by merchant ships; she was subsequently sold to a citizen of one of the belligerent powers, and by him carried to a port of his own country, where she was completely armed, equipped, and furnished with a commission; and she afterwards sailed on a cruise, and captured the prize. *Held*, that this was not an illegal outfit in the United States, so as to invalidate the capture, and give their Courts jurisdiction to restore to the original owner the captured property. *Moodie v. The Alfred*, 3 Dall. 307.

21. A mere replacement of the former force of a French privateer in a port of the United States, under the protection of the 19th article of the French treaty of 1778, is not such an outfit and equipment as will invalidate the captures made by her, and give the Courts of this country jurisdiction to restore the captured property to the original owner. *Moodie v. The Phœbe Ann*, 3 Dall. 319.

22. A vessel and cargo belonging to citizens of the United States, (then neutral,) were captured as prize by a cruiser belonging to one of the belligerent powers, on the high seas, and run on shore within the territory of the United States by the prize master, to avoid recapture by the other belligerent, and abandoned by the prize crew; the vessel and cargo were then attached by the original owner, and an agreement was entered into between the parties, that they should be sold, and the proceeds paid into the District Court, to abide the issue of a suit commenced by the owner against the captors for damages: *Held*, that

they were responsible for the full value of the property injured or destroyed, and that whatever might originally have been the irregularity in attaching the captured vessel and cargo, it was obviated by the agreement of the captors, that the prize should be sold, and that the proceeds of the sale should abide the issue of the suit. *Del Col v. Arnold*, 3 Dall. 333.

23. The possession of the captors in a neutral port, is the possession of their sovereign, and gives jurisdiction to his Courts. *Hudson v. Guestier*, 4 Cranch, 293.

24. If the possession of the captors be lost by re-capture, escape, or voluntary discharge, the Courts of their sovereign lose the jurisdiction which they had acquired by the seizure. *Ib.*

25. The practice of condemning prizes while lying in neutral ports, or those of an ally, is legal. *Hudson v. Guestier*, 4 Cranch, 295. 298.

26. A public vessel of war, belonging to a foreign sovereign at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the Courts of the country. *The Exchange v. M'Fadden et al.* 7 Cranch, 116. 135.

27. If there be no prohibition, the parts of a friendly nation are considered as open to the public ships of all other nations with whom it is at peace, and they enter such ports, and remain in them, under the protection of the government of the place. *Ib.*

28. Whether the public ships of war of one nation enter the ports of another friendly nation, under the license implied by the absence of any prohibition, or under an express stipulation by treaty, they are equally exempt from the local jurisdiction. *Ib.*

29. Quære, Whether a private vessel availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection claimed under the treaty? *Ib.*

30. Where private vessels of one nation enter the ports of another, under a general implied permission only, they are not exempt from the local jurisdiction. *Ib.*

31. The sovereign of the place is capable of destroying the implication, under which national ships of war entering the port of a friendly power open for their reception, are considered as exempted by the consent of that power from its jurisdiction. *The Exchange v. M'Fadden et al.* 7 Cranch, 116. 135.

32. The local sovereign may claim and exercise jurisdiction over the public ships of war of another nation entering his ports under an implied permission, either by employing force, or by subjecting such vessels to the ordinary tribunals. *Ib.*

33. But until such power be expressly exerted, those general provisions which are descriptive of the ordinary jurisdiction of the judicial tribunals, and give an individual whose property has been wrested from him, a right to claim that property in the Courts of the country where it is found, ought not to be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction. *Ib.*

34. The sentence of a competent Court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property. *Williams v. Armroyd*, 7 Cranch, 423. 432.

35. By the sentence of a competent Court, proceeding *in rem*, the right of the former owner of the thing is lost, and a complete title given to the person who claims under the decree. *Ib.*

36. No tribunal of co-ordinate jurisdiction can examine the sentence of another competent Court proceeding *in rem*, or inquire whether it be conformable to public or municipal law. *Ib.*

37. A sale of captured property, made under the direction of the governor of a place belonging to an allied power, on the application of the captor, before adjudication, is confirmed by a subsequent condemnation in the Courts of the captor's country. *Ib.*

38. A sentence of condemnation, in a French Prize Court, of property belonging to a citizen of the United States, under the Milan decree of the 17th of December, 1807, which had been declared by the United States to be contrary to the law of na-

tions and their neutral rights, binds the property on which it acts. *Williams v. Armroyd*, 7 *Cranch*, 423. 432.

39. Had the legislative declaration of the illegality and injustice of the Milan decree been accompanied with a provision that all sentences pronounced under it should be considered as void, and incapable of changing the property they professed to condemn, the Courts of this country would have recognised the title of the original owner, and decreed restitution to him. *Ib.*

40. The general rule as to the prize jurisdiction, is, that the trial of captures made on the high seas, *jure belli*, by a duly commissioned vessel of war, whether from an enemy or a neutral, belongs exclusively to the Courts of that nation to which the captor belongs. *The Alerta*, 9 *Cranch*, 359. 364.

41. But to this rule there are exceptions as firmly established as the rule itself. If the capture be made within the territorial limits of a neutral country, into which the prize is brought, or by a privateer which has been illegally equipped in such neutral country, the prize Courts of such neutral country not only possess the power, but it is their duty to restore the property so illegally captured to the owner. *Ib.* 364. *Talbot v. Janson*, 3 *Dall.* 133. *Id.* 288. note.

42. A neutral nation may, if so disposed, without a breach of its neutral character, grant permission to both belligerents to equip their vessels of war within its territory. But without such permission, the subjects of the belligerent powers have no right to equip vessels, or to increase or augment their force, either with arms or with men, within the territory of the neutral nation. *The Alerta*, 9 *Cranch*, 365.

43. All captures made by means of such equipments of vessels, or augmentation of their force within the neutral territory, are illegal in respect to the neutral nation, and it is competent for its Courts to punish the offenders, and, in case the prizes taken by them are brought *infra praesidia*, to order them to be restored. *Ib.*

44. Even if there were any doubt as to the rule of the law of nations on the subject, the illegality of equipping a foreign ves-

sel of war within the territory of the United States, is declared by the act of June 5th, 1794, c. 226. [L.] and the power and duty the property Courts of the United States, to restore the prizes made in violation of that act, is clearly recognized. *The Alterta, 9 Cranch,* 365.

45. To constitute an illegal equipment or augmentation of the force of a vessel within the territory of the United States, it is immaterial whether the persons enlisted are native citizens or foreigners *domiciled* within the United States. *Ib.*

46. Neither the law of nations, nor the act of Congress, recognizes any distinction in this respect, except as to subjects of the State in whose service they are so enlisted, being *transiently* within the United States. *Ib.*

47. To constitute, in law, a seizure as prize, some act should be done indicative of an intention to seize and to detain as prize, and it is sufficient if such intention is fairly to be inferred from the conduct of the captor. *The Grotius, 9 Cranch,* 368. 370.

48. Putting a prize master on board, with instructions to proceed in the ship, and on his arrival to report himself to the agent of the privateer, but not to interfere in the navigation of the vessel, and to represent himself as a passenger in order to deceive the enemy, constitutes a valid capture as prize. *Ib.*

49. During the late war between the United States and Great Britain, a French privateer duly commissioned, was captured by a British cruiser, afterwards recaptured by a privateer of the United States; again captured by a squadron of British frigates, and recaptured by another United States' privateer, and brought into a port of the United States for adjudication. Restitution, on payment of salvage, was claimed by the French consul. A claim was also interposed by citizens of the United States, who alleged, that their property had been unlawfully taken by the French vessel, before her first capture, on the high seas, and prayed an indemnification from the proceeds. Restitution to the original French owner was decreed; and it was held, that the Courts of this Country have no jurisdiction to redress any supposed torts committed on the high seas upon the property of

our citizens, by a cruiser regularly commissioned by a foreign and friendly power, except when such cruiser has been fitted out in violation of our neutrality. *L'Invincible*, 1 Wheat. 238.

50. The government of the United States having recognised the existence of a civil war between Spain and her colonies, but remaining neutral, the Courts of the Union are bound to consider as lawful those acts which war authorizes, and which the new governments in South America may direct against their enemy. *The Divina Pastora*, 4 Wheat. 52. 63.

51. Unless the neutral rights of the United States (as ascertained by the law of nations, the acts of Congress, and treaties) are violated by the cruisers sailing under commissions from those governments, captures by them are to be regarded by us as other captures, *jure belli*, are regarded; the legality of which cannot be determined in the Courts of a neutral country. *Ib.*

52. Where restitution of captured property is claimed, upon the ground that the force of the cruiser making the capture has been augmented within the United States, by enlisting men, the burthen of proving such enlistment is thrown upon the claimant; and that fact being proved by him, it is incumbent upon the captors to show, by proof, that the persons so enlisted were subjects or citizens of the prince or state under whose flag the cruiser sails, *transiently* within the United States, in order to bring the case within the proviso of the 2d section of the act of June 5th, 1794, c. 226. [L.] and of the act of the 20th of April, 1818, c. 83. *The Estrella*, 4 Wheat. 298. 306.

53. The right of adjudicating on all captures and questions of prize belongs exclusively to the Courts of the captor's country; but, it is an exception to this general rule, that where the captured vessel is brought, or voluntarily comes, *infra praesidia*, of a neutral power, that power has a right to inquire whether its own neutrality has been violated by the cruiser which made the capture; and, if such violation has been committed, is in duty bound to restore to the original owner property captured by cruisers illegally equipped in its ports. *Ib.*

54. No part of the act of the 5th of June, 1794, c. 226. [L.] is

repealed by the act of the 3d of March, 1817, c. 58. The act of 1794 remained in force until the act of the 20th of April, 1818, c. 83. by which all the provisions respecting our neutral relations were embraced, and all former laws on the same subject were repealed. *The Estrella*, 4 Wheat. 298. 306.

55. In the absence of any act of Congress on the subject, the Courts of the United States would have authority, under the general law of nations, to decree restitution of property captured in violation of their neutrality, under a commission issued within the United States, or under an armament, or augmentation of the armament or crew of the capturing vessel, within the same. *Ib.*

56. A cruiser, equipped at the port of Carthagena, in South America, and commissioned under the authority of the province of Carthagena, one of the United Provinces of New Grenada, at war with Spain, sailed from the said port, and captured on the high seas, as prize, a vessel and cargo belonging to the subjects of the king of Spain, and put a prize crew on board, and ordered her to proceed to the said port of Carthagena; the captured vessel was afterwards fallen in with by a private armed vessel of the United States, and the cargo taken out and brought into the United States for adjudication, as the property of their enemy. The original Spanish owner, and the prize master from the Carthaginian cruiser, both claimed the goods. The possession was decreed to be restored to the Carthaginian prize master. *The Nuestra Senora de la Caridad*, 4 Wheat. 497. 501.

57. War having been recognised to exist between Spain and her colonies, by the government of the United States, it is the duty of the Courts of the United States, where a capture is made by either of the belligerent parties, without any violation of our neutrality, and the captured prize is brought innocently within our jurisdiction, to leave things in the same state they find them, or to restore them to the state from which they have been forcibly removed by the act of our own citizens. *Ib.*

58. The Spanish treaty held not to apply to the above case, as the Court could not consider the Carthaginian captors as

pirates, and the capture was not made within the jurisdictional limits of the United States, the only two cases in which the treaty enjoins restitution. *The Nuestra Senora de la Caridad*, 4 Wheat. 497. 501.

59. Upon a piratical capture, the property of the original owners cannot be forfeited in a neutral Court, for the misconduct of the captors in violating the municipal laws of the country where the vessel seized by them is carried. *The Josefa Segunda*, 5 Wheat. 338. 357.

60. But where the capture is made by a regularly commissioned captor, he acquires a title to the captured property; which can only be divested by recapture, or by the sentence of a competent tribunal of his own country; and the property is subject to forfeiture for a violation, by the captor, of the revenue or other municipal laws of the neutral country into which the prize may be brought. *Ib.*

61. In cases of violation of our neutrality by any of the belligerents, if the prize comes voluntarily within our territory, it is restored to the original owners by our Courts. But their jurisdiction for this purpose, under the law of nations, extends only to restitution of the specific property, with costs and expenses, during the pendency of the suit, and does not extend to the infliction of vindictive damages as in ordinary cases of marine torts. *La Amistad de Rues*, 5 Wheat. 385. 389.

62. Quære, Whether, where a prize has been taken by a privateer fitted out in violation of our neutrality, the vessels of the United States have a right to recapture the prize on the high seas, and bring it into our ports for adjudication? *Ib.*

63. Where the original owner of captured property seeks for restitution in our Courts, upon the ground of a violation of our neutrality by the captors, the *onus probandi* lies upon him; and if there be reasonable doubt respecting the facts, the Court will decline to exercise its jurisdiction. *Ib.*

64. The Admiralty has jurisdiction of a supplemental libel, filed after condemnation, to compel a distribution of the prize proceeds. *Keene et al. v. The Gloucester*, (*Federal Court of Appeals*,) 2 Dall. 37.

65. The Courts of common law have no jurisdiction, directly or incidentally, of the question of prize or no prize. *Bingham v. Cabot*, 3 Dall. 19.

66. Congress had power, both before and after the ratification of the articles of confederation, in 1781, to institute a tribunal with appellate jurisdiction in cases of prize; and the Court of Appeals, established under that power, had authority to hear and determine all appeals from the State Courts in prize causes. *Penhallow et al. v. Doane*, 3 Dall. 54. 80. 85. 109. *The United States v. Peters*, 5 Cranch, 115. 140.

67. The Court of Appeals having jurisdiction of the subject matter, and being the Court of the highest jurisdiction, no other Court could afterwards review, directly or collaterally, its proceedings; nor take notice of any irregularities therein, or in the mode of removing the cause before the Court of Appeals. *Penhallow et al. v. Doane*, 3 Dall. 85. 96. 101. 103. 116.

68. The District Courts of the United States, since the establishment of the new constitution, have jurisdiction to carry into effect the decrees of the former Court of Appeals in prize causes, either specifically or by way of damages. *Id.* 86. 97. *Jennings v. Carson*, 4 Cranch, 2.

69. The proceeding in a Court of Admiralty are *in rem*; its sentence, or that of a Court of Appeals, in prize causes, binds all the world, as to every thing contained in it; and its proceedings are not affected by the death of any of the parties. *Penhallow et al. v. Doane*, 3 Dall. 54. 86.

70. By the practice of the Court of Admiralty, the thing in controversy is placed in the custody, and under the absolute control of the Court; this control over the thing is inherent in the Court, and is merely regulated by the prize acts and other statutes. *Jennings v. Carson*, 4 Cranch, 23, 24.

71. The District Courts are Courts of Admiralty, and their practice not being regulated by law, they proceed according to the general rules of the Admiralty, and the *res* in controversy is always in possession of the law. *Ib.*

72. The Courts of the United States, under the judiciary act

of 1789, c. 20: have, by the delegation of all civil causes of Admiralty and Maritime jurisdiction, as full jurisdiction of all prize causes as the Admiralty in England. *Brown v. The United States*, 8 Cranch, 137. *Per Story, J.*

73. The prize jurisdiction is an ordinary, inherent branch of the powers of the Court of Admiralty, and not an extraordinary power delegated or called into action at the breaking out of a war. *Ib. Per Story, J.*

74. *Quare*, Whether the Admiralty has jurisdiction to take cognizance of captures made on land by land forces only? *Ib.*

75. The prize jurisdiction does not depend upon *locality*, but upon the *subject matter*. The Admiralty takes cognizance, not only of all captures made at sea, and in creeks, havens, and rivers, but also of all captures made on land, by a naval force, or by co-operation with a naval force. *Ib. Per Story, J.*

76. *Quare*, Whether a seizure, by a noncommissioned captor, on land, of property liable to seizure and condemnation in war, ought to be proceeded against as prize, or by a process applicable to municipal confiscations? *Ib.*

77. A capture, although well made, gives no authority to the Prize Court to proceed to adjudication, if it be *voluntarily abandoned* before judicial proceedings are instituted. *The Am. 9 Cranch, 294.*

78. But a tortious ouster of possession, or fraudulent rescue or relinquishment after seizure, will not devest the jurisdiction. *Ib.*

79. The District Courts of the United States have jurisdiction of questions of prize, and its incidents, independent of the special provisions of the prize act of the 26th of June, 1812, c. 430. [cvi.] *The Amiable Nancy*, 3 Wheat. 546. 557.

## PRIZE II.

*Authority to capture, and exemption from capture.*

80. The definition of prize goods is, that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy. *The Adeline, 9 Cranch, 284, 285.*

81. The right of seizing a vessel, and bringing in for farther examination, do not authorize, or excuse, any spoliation or damage done to the property; but the captors proceed at their peril, and are liable for all the consequent injury and loss. *Del Col v. Arnold, 3 Dall. 333,*

82. The owners of a privateer are responsible for the conduct of their agents, the officers and crew, to all the world; and the measure of such responsibility is the full value of the property injured or destroyed. *Ib.*

83. Every contention by force between two nations, in external matters, under the authority of their respective governments, is a public war. *Bas v. Tingey, 4 Dall. 40. Per WASHINGTON, J.*

84. If war be declared in form, it is called *solemn*, and is of the perfect kind; and the whole nation is at war with another whole nation, and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance. *Ib. Per WASHINGTON, J.*

85. Hostilities limited as to places, persons, and things, may subsist between two nations; which is properly termed *imperfect* war, and in which those authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. *Ib. Per WASHINGTON, J.*

86. The hostilities between France and the United States in 1799, constituted an *imperfect* war; but it was a *public* war, because authorized by the public authority. *Bas v. Tingey, 4 Dall. 37.*

87. Congress is empowered to declare a *general* war, or to

carry on a war, limited in place, objects, and time. *Bas v. Tingey*, 4 Dall. 43. *Talbot v. Seaman*, 1 Cranch, 28.

88. If a general war is declared, its extent and operations are only regulated by the law of nations; but if a partial war is waged, its extent and operation depends on municipal law. *Bas v. Tingey*, 4 Dall. 43. *Per Chase, J.*

89. The ordinance of Congress of the 9th of December, 1781, that all enemy ships and vessels, with their cargoes, which should be seized and brought in by the respective crews thereof, should be deemed and adjudged lawful prize to the captors.—was a lawful exercise of the rights which war gives against an enemy; Courts were bound so to consider it; and the condemnation of a vessel so brought in, amounted necessarily to an absolute transfer of the property, and to a complete annihilation, in a legal point of view, of the title of the owners. *Hannay v. Eve*, 3 Cranch, 242. 247.

90. Where, after the declaration of independence, and after the alliance of the United States with France, the British island of Dominica was taken by the arms of the French king; and before the reduction of it, a capitulation took place, by the 13th article of which it was stipulated, "that the merchants and inhabitants of this island, included in the present capitulation, shall enjoy all the privileges, and on the same conditions, as are granted to the subjects of his most Christian Majesty, throughout the extent of his dominions :" It was held, that this capitulation extended protection to property, when shipped from the island and afloat at sea. *Miller v. The Resolution*, (Federal Court of Appeals,) 2 Dall. 8. 17.

91. By the 9th article of the above capitulation it was stipulated that "the absent inhabitants, and such as are in the service of Great Britain, shall be maintained in the possession and enjoyment of their estates; which shall be managed for them by their attorneys ;" and by the 12th, "that widows and other inhabitants, who, through illness, absence, or any other impediment, cannot immediately sign the capitulation, shall have a limited time to accede to it :" the claimants in the cause, having

acceded to the capitulation, though absentees from the island, and resident in Great Britain, were held entitled to restitution of property, the proceeds of their estates in the island. *Miller v. The Resolution*, (*Federal Court of Appeals*,) 2 Dall. 8. 17.

92. If any one subscribing the capitulation should afterwards go into the service of Great Britain, and commit acts of hostility against France and America, he would break his engagement of neutrality, and forfeit all the rights and privileges of trade, and his property captured at sea would become prize. *Ib.*

93. *Held*, that property shipped from the island of Dominica for Holland, was protected from capture, under this capitulation, though the proceeds of the cargo were to be principally remitted to Great Britain, on the orders of the owners resident there. *Ib.*

94. Goods shipped from the belligerent State, to a neutral country, with intent to remit the proceeds to the enemy's country for the payment of debts, are not prize on capture by a cruiser of the belligerent State. *Ib.*

95. The protection of the above capitulation did not extend to a voyage from Dominica to Great Britain, nor to the property of British subjects not residents or owning estates in Dominica. *Ib.*

96. An ally is bound by a capitulation made by another ally with the inhabitants of a conquered country, by which their property is exempted from capture. Therefore, *held*, that property included in the capitulation of Dominica, was protected from capture by the cruisers of the United States. *Ib.*

97. The resolutions of Congress, during the war of the revolution, with regard to Bermudas and other British islands, did not exempt vessels belonging to those islands from capture by the French; because those resolutions could not be considered as a compact with the people of Bermudas, but were a mere voluntary suspension of the rights of war: if France, as an ally, was bound by them, she would only be bound in the extent that America was. America might say, when she pleased, that those resolutions should not exist, and so might France. *Ib.*

98. There are two kinds of war, perfect and imperfect: a perfect war is one which destroys the national peace and tranquillity, and lays the foundation of every possible act of hostility: The imperfect war is that which does not entirely destroy the public tranquillity, but interrupts it only in some particulars; as in the case of reprisals. *Miller v. The Resolution, (Federal Court of Appeals,) 2 Dall. 8. 17. 21.*

99. In the case of a perfect war, nothing but a treaty of peace can restore the neutral character of one of the belligerent parties: therefore, *held*, that the British proclamation, which issued in 1781, exempting from capture for a limited time, all Dutch ships carrying the produce of Dominica, according to the articles of the capitulation of that island, did not restore back to a Dutch ship her original neutral character, so as to protect the cargo on board of her from capture by American cruisers, under the ordinance of Congress of the 7th of April, 1781, permitting "all neutral vessels freely to navigate on the high seas, or coast of America, except such as are employed in carrying contraband goods, or soldiers, to the enemies of the United States"—and prohibiting seizures or captures of "effects belonging to the subjects of the belligerent powers, on board of neutral vessels, excepting contraband goods," &c. *Ib.*

100. Possession is presumptive evidence of property: and a possession by the enemy, will justify capture, so as to exempt the captors from damages, even on acquittal of the property as neutral. *Id. 23.*

101. The ordinance of Congress of the 7th of April, 1781, exempting from capture enemy's property on board of neutral vessels, did not extend to the case of a fraudulent attempt on the part of neutrals to combine with British subjects to wrest out of the hands of the United States and France the advantages they had gained over Great Britain, by the rights of war, in the capitulation of Dominica, by which a commercial intercourse between Great Britain and that island, was prohibited. *Darby et al. v. The Estern et al. (Fed. Court of Appeals,) 2 Dall. 35.*

102. The stipulation in a treaty, that *free ships shall make free*

goods, does not necessarily imply the converse proposition that enemy ships shall make enemy goods. *The Nereide*, 9 Cranch, 388. 418.

103. The rule, that the goods of an enemy found in the vessel of a friend, are prize of war, and that the goods of a friend found in the vessel of an enemy, are to be restored, is a part of the law of nations, as generally, perhaps universally, acknowledged; and has been fully and unequivocally recognized by the United States. *Ib.*

104. Reciprocating to the subjects of a foreign nation, or retaliating on them its unjust proceedings towards our citizens, is a political, not a judicial measure. It is for the consideration of the Government, not of its Courts. *Id.* 422.

105. Where it was alleged, that a prize ordinance of Spain existed which would subject the property of our citizens to condemnation when found on board the vessels of the enemy of Spain, the Court refused to condemn Spanish property found on board a vessel of our enemy, upon the ground of reciprocity; because the government had not manifested, by an act of Congress, its will to retaliate on Spain, and until such an act was passed, the Court was bound by the law of nations, which is a part of the law of the land. *Ib.*

106. It is a universal principle, applicable to a *partial* or a *general* war, that where there is probable cause to believe a vessel is liable to capture, it is lawful to take her and subject her to the examination of the prize Courts. *Talbot v. Seeman*, 1 Cranch, 31.

107. Every nation at war with another, is justifiable, by the general and strict law of nations, to seize and confiscate all moveable property of its enemy, (of any kind or nature whatsoever,) wherever found, whether within its territory or not. *Ware v. Hylton*, 3 Dall. 199. 226. *Per Chase, J.*

108. The relaxation or departure from the strict belligerent right of confiscating private debts, is not a part of the universal or the conventional law of nations, but is founded on custom only; and every nation is at liberty to reject, or adopt the cus-

tom, as it thinks fit. *Ware v. Hylton*, 3 Dall. 199. 226, 227.

263. *Per Chase and Iredell, J. J.*

109. War gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found. *Brown v. The United States*, 8 Cranch, 122. 139. 143.

110. The mitigation of this rule by modern practice, more or less affects the exercise of the right; but the right itself remains undiminished, and when the sovereign authority chooses to bring it into operation, the judicial department must give effect to its will. *Ib.*

111. The modern usage of nations is to abstain from confiscating the debts due to an enemy, or his property found within the territory, at the breaking out of war. *Ib.*

112. The usage not to confiscate debts due to an enemy, or his property found within the territory, at the commencement of war, does not constitute a rule acting directly on the thing itself by its own force, but only through the sovereign power. It is a guide which the sovereign follows or abandons at his will. But unless it be abandoned, the right to the debts and the property, is only suspended during the war, and revives with the return of peace. *Ib.*

113. Enemy's property, found on land at the commencement of hostilities, cannot be seized and condemned as a necessary consequence of the declaration of war. *Ib.*

114. The act of the 17th of June, 1812, c. 425. [cii.] declaring war to exist between the United States and Great Britain, did not authorize the confiscation of enemy's property found on land within the territory of the United States. *Ib.*

115. It is the established rule of the common law, that all choses in action, belonging to an enemy, are forfeitable to the crown; and the crown may, at any time during the war, institute a process, and appropriate them to itself. *Brown v. United States*, 8 Cranch, 129. *Per Story, J.* *Ware v. Hylton*, 3 Dall. 227. 264.

116. It is the practice of Great Britain to seize as prize all enemy vessels and cargoes found afloat in her harbours at the

commencement of war. *Brown v. United States*, 8 Cranch, 129. *Per Story, J.* *Ware v. Hylton*, 3 Dall. 227. 264.

117. The confiscation of enemy's vessels and cargoes found in port at the commencement of war is lawful, and rests in the sound discretion of the national sovereign. *Brown v. United States*, 8 Cranch, 129. *Per Story, J.*

118. A vessel and cargo belonging to a subject of one belligerent nation, (Great Britain,) captured on the high seas by a cruiser of the other belligerent, (France,) given by a donation in writing to a neutral citizen, (of the United States,) and by him brought into port, and libelled in the Court of his own country, between which, and Great Britain, war is declared pending the proceedings, determined to be a case of salvage; and that the residue of the property, after payment of salvage, must stand on the same footing with other enemy's property found within the territory at the declaration of war; and though liable to be confiscated by the legislative power of the country, yet until some act was passed on the subject, should be preserved under the protection of the law, until the capacity of the original British owner to claim it, unless previously confiscated, should be revived by the return of peace. *The Adventure*, 8 Cranch, 221.

119. A capture by putting a prize master only on board is valid. *The Alexander*, 8 Cranch, 179.

120. The inability of the prize master to secure the captured vessel against a rescue, should one be attempted; his inability to bring in the captured vessel, without the aid of her crew, is no proof of abandonment by the captors. *Ib.*

121. The president's instructions of the 28th of August, 1812, commanding privateers not to capture such American vessels as had sailed from Great Britain for the United States, in consequence of the alleged repeal of the British orders in council, did not apply to a vessel sailing from Great Britain for the United States, in May, 1813, when the orders in council were no longer alleged to be repealed. *The Alexander*, 8 Cranch, 169. 180.

122. The passports or safe-conducts granted in former times to the fishing vessels of enemies were founded upon reciprocity

and mutual consent, or upon express compacts between the belligerent powers. *The Julia*, 8 *Cranch*, 181. 200.

123. *Quære*, How far the President, in his character of commander in chief of the army and navy of the United States, has power, independent of any statute provisions, to issue instructions for the government and direction of privateers? *The Thomas Gibbons*, 8 *Cranch*, 421. 427.

124. Under the prize act of the 26th of June, 1812, c. 430. [cvii.] s. 8. which provides that the President shall have power "to establish and order suitable instructions for the better governing and directing the conduct" of private armed vessels commissioned under the act, the President had authority to issue the instruction of the 28th of August, 1812, directing the public and private armed vessels of the United States not to interrupt "any vessels belonging to the citizens of the United States, coming from British ports to the United States, laden with British merchandise, in consequence of the alleged repeal of the British orders in council." *Ib.*

125. The President had, under the prize act of the 26th of June, 1812, c. 430. [cvii.], power to grant, annul, and revoke, at his pleasure, the commissions of privateers; and by the act of the 18th of June, 1812, c. 425 [cii.] declaring war, he was authorized to issue those commissions in such form as he should deem fit. *Ib.*

126. The right of capture is entirely derived from the law: it is a limited right, which is subject to all the restraints which the Legislature has imposed; and is to be exercised in the manner which its wisdom has prescribed. *Ib.*

127. The commission of a privateer is qualified and restrained by the power of the President to issue instructions. The privateer takes it, subject to such power, and contracts to act in obedience to all the instructions which the President may lawfully promulgate. *Ib.*

128. A shipment made even after a knowledge of the war, might well be deemed to have been made in consequence of the repeal of the orders in council, and thus be embraced within the

President's instruction of the 28th of August, 1812, if made within so early a period as would leave a reasonable presumption that the knowledge of that repeal would induce a suspension of hostilities on the part of the United States. *The Thomas Gibbons*, 3 *Cranch*, 421. 427.

129. The property of a citizen does not become devested, *ipso facto*, by the mere act of illicit intercourse with the enemy; the property is only liable to be condemned, as enemy's property, or as adhering to the enemy, if rightfully captured during the voyage. *Ib.* 429, 430.

130. The President's instruction of the 28th of August, 1812, meant to protect all British merchandise on board an American vessel, without any exception on account of British proprietary interest in the cargo. *Ib.* 430.

131. Captures, as prize of war, may lawfully be made within the territorial limits of the United States, at any place below low-water mark. *The Joseph*, 8 *Cranch*, 455.

132. A vessel which is on her way, and near, to a port of the United States, at the time of seizure, is not exempt from capture. It is not for the captor to know whether a vessel, which has offended against the law of nations, and is apparently destined to a port of the United States, will certainly enter the port; and he is not bound to forego the opportunity which chance or his own vigilance may have presented to him to acquire property, which under his commission he is authorized to appropriate to himself. *Ib.*

133. The President's instructions of the 28th of August, 1812, were intended to protect from capture all vessels which had sailed in the confidence that was inspired by the repeal of the British orders in council, however the voyage might be protracted. *The Mary*, 9 *Cranch*, 126. 150.

134. A vessel, belonging to citizens of the United States, sailing from England in August, 1812, in consequence of the repeal of the British orders in council, and compelled by stress of weather to put into Ireland, and there necessarily detained until April, 1813, when it again departed for the United States,

with a British license, was protected from capture by the armed vessels of the United States, on the voyage, by the President's instructions of the 28th of August, 1812. *The Mary, 9 Cranch*, 126. 150.

135. A neutral may lawfully put his goods on board a belligerent ship for conveyance on the ocean, and the hostile character of the vessel will not condemn the goods. *The Nereide, 9 Cranch*, 425. 437.

136. A neutral may lawfully put his goods on board an armed belligerent vessel for conveyance, without rendering the goods liable to confiscation, although the whole vessel be chartered by him, and he be on board at the time of capture, unless he be instrumental in the armament, has a control in the navigation and management of the ship, or aids in the resistance. *The Nereide, 9 Cranch*, 38S. 423. 433. STORY and DUVALL, J. J. dissententes. TODD, J. absente.

137. A neutral cargo found on board an armed enemy's vessel, is not liable to condemnation as prize of war. *The Atalanta, 3 Wheat.* 409. 415. 417. TODD and DUVALL, J. J. absentes.

138. An alien may be the commander of a privateer without invalidating a capture made by him. *The Mary and Susan, Richardson's claim, 1 Wheat.* 46. 56.

139. The President's instructions of the 28th of August, 1812, must have been actually known to the commanders of vessels of war, at or before the seizure, in order to invalidate captures made contrary to the instructions. *The Mary and Susan, Richardson's claim, 1 Wheat.* 46. 57.

140. An enemy's vessel was captured by a privateer, recaptured by another enemy's vessel, and again recaptured by another privateer, and brought in for adjudication: Held, that the prize vested in the last captor. An interest acquired in war, by possession, is devested by the loss of possession. *The Astrea, 1 Wheat.* 125.

141. Quære, Whether the British rule of the war of 1756, be

founded on correct principles? *The Commercen*, 1 Wheat. 396.  
*Per MARSHALL, C. J.*

142. The rule of 1756 stands upon two grounds: 1st. That a trade, such as the coasting or colonial trade, which, by the permanent policy of a nation, is reserved for its own vessels, if opened to neutrals during war, must be opened under the pressure of the enemy's arms, and in order to obtain relief from that pressure, which relief a neutral has no right to afford. 2dly. If the trade be not opened by law, that a neutral employed in a trade thus reserved by the enemy to his own vessels, identifies himself with that enemy, and assumes a hostile character. *Ib.*

143. It is the exclusive right of governments to acknowledge new States arising in the revolutions of the world, and until such recognition by our Government, or by the Government to which such new State previously belonged, Courts of justice are bound to consider the ancient order of things as remaining unchanged. *Gelston v. Hoyt*, 3 Wheat. 324.

144. A capture made within neutral waters, is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral Sovereign that its legal validity can be called in question; and as to him, and him only, it is to be considered void. *The Anne*, 3 Wheat. 435. 447.

145. A ship, first commencing hostilities on the captor within neutral jurisdiction, forfeits the protection of the neutral State, and is liable to capture. *Ib.*

146. When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the Courts of the United States must view such newly constituted Government as it is viewed by the legislative and executive departments of the Government of the United States. If the Government of the Union remains neutral, and recognizes the existence of a civil war, its Courts cannot consider as criminal those acts of hostility which war authorizes, and which the new Government may direct against its enemy. *The United States v. Palmer*, 3 Wheat. 610. 634.

147. The same testimony which would be sufficient to prove, that a vessel or person is in the service of an acknowledged State, is admissible to prove that a vessel or person is in the service of a newly erected Government acknowledged to be maintaining its separate existence by war. *The United States v. Palmer*, 3 Wheat. 610. 634.

148. The seal of such unacknowledged Government cannot be permitted to prove itself; but it may be proved by such testimony as the nature of the case admits; and the fact, that a vessel is employed in the service of such Government, may be proved without proving the seal. *Ib.*

149. Before the declaration of independence on the 4th of July, 1776, the war between Great Britain and the United Colonies (afterwards the United States) was a mere civil war; but after that declaration, it became a public war, between independent Governments; immediately thereupon all the rights of public war attached to the new Government; and not only the two nations, but all the subjects of each, were in a state of war, precisely as in a war between two ancient Governments. *Ware v. Hylton*, 3 Dall. 199. 224. *Per Chase, J.*

150. British subjects who continued to adhere to their former allegiance after the declaration of independence, were personally answerable for the conduct of that Government of which they remained a part; and their property, wherever found, (on land or water,) became liable to confiscation. *Ib.*

151. Where an enemy's vessel was captured by a private armed vessel of the United States, and subsequently dispossessed by the force or terror of another; the prize was, under the circumstances of the case, adjudged to the first captor, with costs and damages. *The Mary*, 2 Wheat. 123. 130.

## PRIZE III.

## Questions of proprietary interest and freight.

152. Possession by the enemy is presumptive evidence of enemy's property. *Miller et al. v. The Resolution*, (Federal Court of Appeals,) 2 Dall. 22. *The Adeline*, 9 Cranch, 285.

153. The circumstance of goods being found on board an enemy's ship, raises a legal presumption that they are enemy's property. *The London Packet*, 5 Wheat. 132. 137.

154. The papers with which a ship is directed to be furnished by the law of its own country, is the criterion adopted by the law of nations to distinguish the property of different powers when found at sea; not indeed as conclusive, but as presumptive evidence only. *Miller et al. v. The Resolution*, (Federal Court of Appeals,) 2 Dall. 23.

155. If enemy's property be fraudulently blended in the same shipment and claim with neutral property, the latter must share the fate of the former. *Miller et al. v. The Ship Resolution*, (Federal Court of Appeals,) 2 Dall. 33. *The St. Nicholas*, 1 Wheat. 417. 431. *The Fortuna*, 3 Wheat. 236. 245.

156. The ordinance of Congress, during the war of the revolutions, recognising the rule of free ships free goods, did not extend to the case of a fraudulent combination with British subjects to wrest from France and the United States the advantages they had acquired by the conquest of Dominica. *Darby et al. v. The Eastern*, (Federal Court of Appeals,) 2 Dall. 34.

157. It is a rule of the Prize Court, that the *onus probandi* lies on the claimant; he must make a good and sufficient title, before he can call on the captors to show any ground for the capture. *Brown v. The United States*, 8 Cranch, 135.

158. All contracts made with an enemy during war are void, and the claim of a citizen founded on a purchase from the enemy, *flagrante bello*, will be rejected. *B.*

159. Although, as between belligerents, capture produces a

complete change of property, yet in the case of a purchase made by a subject of the same country or a neutral, a sentence of condemnation is an essential part of the documentary evidence to support the title of the purchaser. *The Adventure*, 8 Cranch, 226.

160. Upon a shipment of goods to be sold, on joint account of the consignee and shipper, or of the latter alone, at the option of the consignee, the right of property does not vest in the consignee until he has made his election under the option given him. *The Venus, claim of Magee & Jones*, 8 Cranch, 253. 275.

161. To effect a change of property as between seller and buyer, there must be a contract of sale agreed to by both parties ; and if the thing agreed to be sold, is to be sent by the vendor to the vendee, it is necessary to the perfection of the contract, that it should be delivered to the purchaser or to his agent, which the master to many purposes is considered to be. *Ib.*

162. Where goods were purchased in the enemy's country, before the declaration of war, by the agent of M'K. & W., citizens of, and residents in, the United States, in pursuance of orders from them, and consigned to R. H., a citizen and resident of the United States, and no circumstance of fraud or *mala fides* appeared in the transaction : held, that the property vested in M'K. & W., and that they were entitled to restitution. *The Merrimack, claim of M'Kean & Woodland*, 8 Cranch, 317. 327.

163. But where goods were purchased as above for K. & A. citizens and residents of the United States, and the accompanying invoices, bills of lading, and letters of advice, were addressed by the enemy shippers to K. & A. ; but these papers were enclosed in a letter written by the shippers to their agent, stating, "If, when you receive our invoices and bills of lading, a state of war should really continue, it will be proper not to deliver these goods until you have received the amount of the invoices from the consignees in cash." Held, that no change of property could take place till K. & A. should accede to these new conditions, and that the capture having taken place before the con-

tract was complete, the goods must be considered as enemy's property. *The Merrimack, claim of Kimmel & Albert, 8 Cranch, 328.*

164. Where goods were purchased as above, for W. & J. W., citizens of and resident in the United States, and a bill of parcels (which was the only invoice found on board) was in the name of W. & J. W., and sent directly to them; but the bill of lading was in the name of E. H., one of the shipping house, a citizen of and resident in the United States, to whom the shipper wrote, "With this you will receive a bill of lading of eleven cases of worsted and cotton hosiery for Messrs. W. & J. W." &c.; "informed them that we thought it necessary to secure our property to ship all to you, as you could prove that they were American property by making affidavit that they are *bona fide* your property. As our orders in council are repealed, hope your government will be amicably inclined as well, and that trade will be on regular footing again; but for fear that there should be some other points in dispute, I shall send you and our friends through your hands, all the goods prepared for your market which you'll perceive is very large." "Hope you will approve of my sending all, and as there may have been some alterations in some of your friends, shipping them to you, gives the power of keeping back, to you." And also wrote to W. & J. W. "As we are not certain that your government will protect British property, we have thought it right to ship all ours under cover to Mr. H., who can claim as his own *bona fide* property, he being a citizen of the United States, thought proper to use every precaution, having received some unpleasant accounts about your government having agreed on war with this country, which we hope will not be the case." Held, that the property vested in W. & J. W. on the shipment, and that they were entitled to restitution. *WASHINGTON, TODD, and STORY, J. J., dissentientes. The Merrimack, claim of W. & J. Wilkins, 8 Cranch, 328.*

165. Where, by the papers found on board, it appeared that the goods were a consignment from enemy shippers to merchants resident in the United States, on the account and risk of the

former, the goods were condemned *in toto*, and further proof was refused to show that the consignees were interested, and that they had a lien upon the goods for advances made by them. *The Frances*; 8 *Cranch*, 335.

166. Where the enemy shipper, from whom goods had been ordered by the consignees, wrote to them, and after stating that the goods were sent partly in the *Fanny* and partly in the *Frances*, (by which latter ship the goods in question were sent,) said, "I have exceeded in some articles, and have sent you others not ordered;" "I leave it with yourselves to take the whole of the two shipments, or none at all, just as you please. If you do not wish them, I will thank you to hand the invoices and letters over to Messrs. T. & Co. I think twenty-four hours will allow you ample opportunity for you to make up your minds on this point; and if you do not hand them over within that time, I will, of course, consider that you take the whole." On the 22d of August, 1812, after the arrival of the *Fanny*, the consignees wrote to T. & Co., and accepted the shipment by the *Fanny*, and with regard to the *Frances*, said: "His letter also speaks of another shipment of 31 packages per *Frances*, which on arrival we shall then hand in our determination." The *Frances* was captured and brought in for adjudication on the 28th of August, and on the 19th of September, the consignees accepted the shipment by that vessel. *Held*, that the goods remained the property of the enemy shipper until the consignees had made an election to take them, and that such election could not be made after the capture was known to them. It is a rule of prize law, that property cannot be transferred *in transitu*, and this case formed no exception to that rule. *The Frances*, *claim of Dunham & Randolph*; 8 *Cranch*, 354. S. C. 9 *Cranch*, 183.

167. W. F., a citizen of, and resident in, the United States, claimed goods shipped by J. A., resident in the enemy's country, to A. & J. A., resident in the United States, on their account and risk, with orders to remit the proceeds to the shipper for payment. W. F., the claimant, alleged that the goods had been previously ordered by him, through A. & J. A., to be imported

on his own account and risk. Upon an order for farther proof, the claimant produced a letter signed by himself, and addressed to A. & J. A., requesting them to order from their friends in Scotland, goods not exceeding in value 1,000*l.* sterling, to be shipped so soon as the British orders in council should be revoked; and a letter from A. & J. A. to the claimant, written after the capture, advising him of the capture of the goods, said to be shipped on his account to their address, and desiring him to take the necessary steps to have his property cleared. But no order from the consignees, A. & J. A., to the shipper, authorizing the shipment, was produced: *Held*, that to produce a change of property from the shipper to the consignees, it was essentially necessary that the goods should have been sent in consequence of some contract between the parties, by which the one agreed to sell and the other to buy. That had the intention of the consignors to vest the right of property in the consignees been clearly proved, it would not have been sufficient to effect such a change, until the goods were received, or some evidence given of the agreement of the consignee to take them on his own account. That the claim of W. F., was in no respect stronger than if made by A. & J. A., the consignees, there being no proof that the goods were ordered by them as the agent of W. F. And that the goods were at the risk of the shipper until they should be received by the consignee, and being captured before they were so received, were by the capture made good prize as enemy's property. *The Frances, claim of W. French, 8 Cranch, 359.*

168. No lien upon enemy's property, by way of pledge or hypothecation, or for advances made by the consignee to the consignor, or in virtue of a general balance of account due to the consignee as a factor, is sufficient to defeat the right of the captors in a Prize Court; unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. *The Frances, Irvine's claim, 8 Cranch, 413.*

169. Freight upon enemy's goods seized in the vessel of a

friend, is always decreed to the owner of the vessel. The possession of the property is actually in the ship-owner, of which, by the general mercantile law of nations, he cannot be deprived, until the freight, due for the carriage of it, is paid. *The Frances, Irvine's claim, 8 Cranch, 418.*

170. But in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and upon the Prize Courts, and the door which such a doctrine would open to frauds, have excluded such cases from the consideration of those Courts. *Ib.*

171. When goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent for the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent his lien from attaching. *Ib.*

172. Goods were shipped in the enemy's country, in pursuance of orders from this country, received before the declaration of the late war; but previous to the execution of the orders, the shippers became embarrassed, and assigned the goods to certain bankers in the enemy's country, to secure advances made by them, with a request to the consignees to remit the amount to the bankers, and they (the bankers) also repeated the same request, the invoice being for account and risk of the consignees in this country, but stating the goods to be then the property of the bankers: held, that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them, and was not devested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees. *The Mary and Susan, claim of G. & H. Van Wagenen, 1 Wheat. 25.*

173. A neutral ship was chartered for a voyage from London to St. Michaels, thence to St. Petersburg, or any port in the Baltic, and back to London, at the freight of 1,000 guineas. On her passage to St. Michaels, she was captured and brought

into a port of the United States for adjudication. A part of the cargo was condemned, and part restored. The freight was held to be chargeable upon the whole cargo, as well upon that part restored as upon that condemned. *The Antonia Johanna, 1 Wheat.* 159.

174. *Quære,* Whether in the above case more than a *pro rata*, freight was due to the master? *Id.* 168.

175. Goods were shipped by D. B. & Co. in the enemy's country, on board a neutral ship bound to a neutral port, which was captured and brought in for adjudication. The invoice was headed, "consigned to Messrs. D. B. & F., by order and for account of J. L." In a letter accompanying the invoice from the shippers to the consignees, they say, "For Mr. J. L. we open an account in our books here, and debit him, &c., but find his order for goods will far exceed the amount of these shipments; therefore, we consign the whole to you, that you may come to a proper understanding with him." Held, that the goods were, during their transit, the property and at the risk of the enemy shippers, and therefore subject to condemnation as prize. *The St. Jose Indiana, Lizaur, Claimant, 1 Wheat.* 208.

176. In general, the rules of the Prize Court as to the vesting of property, are the same with those of the common law, by which the thing sold, *after the completion of the contract*, is properly at the risk of the purchaser. *Id.* 212.

177. It is competent for an agent abroad, who purchases in pursuance of orders, to vest the property in the principal immediately on the purchase. This is the case when he purchases exclusively on the credit of his principal, or makes an absolute appropriation and designation of the property for his principal. *H.*

178. But where a merchant abroad, in pursuance of orders, either sells his own goods, or purchases goods on his own credit, (and thereby in reality becomes the owner,) no property in the goods vests in his correspondent, until he has done some notorious act to devest himself of his title, or has parted with the

possession by an actual and unconditional delivery for the use of such correspondent. *The St. Jose Indiano, Lizaur, Claimant*, 1 Wheat. 213.

179. Under the Spanish treaty of 1795, stipulating that free ships shall make free goods, the Spanish character of the ship being satisfactorily ascertained, the proprietary interest of the cargo cannot be inquired into, unless so far as to ascertain that it does not belong to citizens of the United States, whose property, engaged in trade with the enemy, is not protected by the treaty. *The Pizarro*, 2 Wheat. 227. 246.

180. A neutral vessel was chartered to take on board a cargo in the river Thames, and deliver it at Amelia Island, freight free; and there to take on board a return cargo, for which a sum specified in the charter party, was to be paid as freight, which exceeded the freight that would have been paid on the return cargo alone, had it been totally unconnected with the outward voyage. The vessel was captured on the outward voyage, and the cargo condemned as enemy's property. Freight was allowed, by the Court below, to the neutral ship owner, *pro rata itineris*, on the voyage to Amelia Island, as on a *quantum meruit*. The captors not having appealed, held, that no question could arise on the propriety of having allowed the ship *any freight whatever*. But this Court expressed itself satisfied with the allowance which had been made, as an equitable one. *The Societe*, 9. Cranch, 209. 211.

181. On principle, a cargo to be delivered, freight free, cannot be burdened with the freight to be paid on a cargo to be afterwards taken on board; especially, where no sum in gross is to be paid for freight, but a sum depending on the quantity and quality of the return cargo. *Ib.*

## PRIZE IV.

*Domicil and national character.*

182. A Spanish subject who came to the United States, when both Spain and the United States were neutral, to carry on a trade between this country and the Spanish colonies, under a license from the King of Spain, and continued to reside in the United States, and carry on that trade, after the breaking out of war between Great Britain and Spain, is to be considered as a merchant of the United States, and entitled to the privileges of his neutral domicil, although such trade could be lawfully carried on by Spanish subjects only. *Livingston v. Maryland Ins. Co.* 7 Cranch, 508. 537. 542.

183. Such a person held to be as a neutral merchant, whether he carried on trade generally, or confined himself to a trade from the United States to the Spanish colonies. *Ib.*

184. The national character of a person depends upon his domicil, but this must be distinguished from the national character of his trade. The party may be a belligerent subject, and yet engaged in a neutral trade; or he may be a neutral subject, and yet engaged in hostile trade. *Id.* 542. *Per Story, J.*

185. Whenever a person is *bona fide* domiciled in a particular country, the character of the country attaches to him, and it is immaterial what trade he is engaged in, or whether he is engaged in any. *Ib. Per Story, J.*

186. The trade in which a party is engaged, the family that he possesses, and the transitory or fixed character of his business, are ingredients, which may be properly weighed in deciding on the nature of an equivocal residence or domicil. But when once that domicil is ascertained, all other circumstances become immaterial. *Id.* 543. *Per Story, J.*

187. Writers on public law distinguish between a temporary residence for a special purpose in a foreign country, and a resi-

dence accompanied with an intention to make it a permanent place of abode. *The Venus*, 8 *Cranch*, 278.

188. *Domicil* is a residence in a country with the intention, either tacitly or expressly declared, of making it a permanent place of abode. *Ib.*

189. The doctrine of the Prize Courts and Courts of common law, in England, on the subject of *domicil*, is the same with that of the writers on public law, except that it is less general, and confines the consequences of this acquired character to the property of persons engaged in the commerce of the country where they reside. *Ib.*

190. The English Courts of prize and of common law decide, that whilst an Englishman, or a neutral, resides in a hostile country, he is a subject of that country, and has a hostile character impressed upon him. *Ib.*

191. The question whether a person has sufficiently manifested his intention of permanently residing in a country must depend upon all the circumstances of the case. *Id.* 279.

192. If a party has made no express declaration as to his intention of permanently residing in a country, his acts must be attended to, as affording the most satisfactory evidence of his intention. *Ib.*

193. A person who removes to a foreign country, settles there, and engages in the trade of the country, furnishes by these acts such evidence of an intention permanently to reside there, as to stamp him with the national character of that country. *Ib.*

194. In questions of *domicil*, the chief point is the *animus manendi*; and Courts are to devise such reasonable rules of evidence as may establish the fact of intention. *Ib.*

195. If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, a *domicil* is acquired by a residence even of a few days. *Ib.*

196. A neutral or subject found residing in a foreign country, is presumed to be there *animo manendi*; and if a state of war brings his national character into question, the *onus pro-*

'bandi lies upon him to explain the circumstances of his residence.  
*The Venus, 8 Cranch, 279.*

197. *Quære,* As to the validity of the rules of the English Prize Courts, which fix a national character upon a person on the ground of constructive residence, or the peculiar nature of his trade? *Ib.*

198. In the event of a war taking place between the government under which a person resides, and that to which he owes a permanent allegiance, he is deemed an enemy by the latter with reference to the seizure of so much of his property concerned in the enemy's trade, as is connected with his residence. *Id. 280.*

199. The same rule, as to property engaged in the enemy's commerce, applies to neutrals. *Ib.*

200. The subject of a belligerent state, domiciled in a neutral country, is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with all the rest of the world. *Ib.*

201. A national character which a man acquires by residence, may be thrown off by a return to his native country, or even by turning his back on the country in which he has resided, on his way to another. *Ib.*

202. If any thing short of actual removal be admitted to work a change in the national character acquired by residence, the evidence of a *bona fide* intention should be such as to leave no doubt of its sincerity. *Id. 281.*

203. Mere declarations of an intention to remove, ought never to be relied on, when contradicted, or rendered doubtful by a continuance of that residence which impressed the character. *Ib.*

204. A native or naturalized subject of one country, who is surprised by a declaration of war in the country where he was domiciled, is not entitled to time to make his election to continue there; or to remove to the country to which he owes a permanent allegiance; and until such election is made, his property is not protected from capture by the cruisers of the latter. *Id. 283.*

205. Peter Theodore Vantylengen, a merchant, resided in and carried on trade from a British settlement on the bay of Honduras, like other inhabitants, during the war of the revolution: *Held*, that it was not material to whom his natural allegiance was due; he was enjoying the privileges, and subject to the inconveniences, of other merchants residing in the same place; and his property was liable to condemnation as prize in the Courts of the United States. *The Chester v. The Experiment, (Federal Court of Appeals,) 2 Dall. 42.*

206.. A citizen of the United States, resident in a foreign country, may acquire the commercial privileges attached to his domicil. *Murray v. The Charming Betsey, 2 Cranch, 64. 119.* *Maley v. Shattuck, 3 Cranch, 488.*

207. The national character of the owner at the time of capture, must decide his right to claim, and a subject is condemned by it even in the Courts of his native country, without time being allowed him to elect to remove. *The Venus, 8 Cranch, 285.*

208. The hostile character of property at the time of capture, establishes the legality of the capture, and no future circumstance, changing the hostile character of the claimant to that of a friend or subject, can entitle him to restitution. *Ib. 286.*

209. J. T., a native of Great Britain, came to the United States in 1793. where he resided and carried on trade until the year 1801. In 1797, he was naturalized. In 1801, he went to France, on commercial business, and, some time afterwards, passed over to England, where he was employed in making purchases for, and shipments to, his house of trade in the United States, of which R. T. & W. S., residents in the United States, were joint partners. In 1803, he settled in Glasgow, where he continued doing that part of the business of the partnership which was to be transacted in Great Britain, until the declaration of war in 1812. After the knowledge of that event, he transacted no commercial business whatever, and was exclusively employed in arranging his affairs in such manner as would enable him to return to the United States. In August, 1813, he en-

gaged a passage in a vessel about to sail to this country, but was stopped by order of the British Government. He then passed over to Ireland, and privately embarked for the United States, where he arrived in November, 1813. His letters, and other testimony, manifested his intention to return; but there was nothing to show that he had performed any act which could be considered as commencing to return until August, 1813, after the capture, but before the final adjudication: *Held*, that the native character of the claimant reverted by his return to, and acquiring a domicil in, his native country; and that his property was liable to condemnation as enemy's property. *The Frances, Thompson, Claimant*, 8 Cranch, 335.

210. C. G., a native of Great Britain, emigrated to the United States in 1793, and was naturalized in 1798, having in the interim returned to his native country on mercantile business in 1794 and 1796, and revisited the United States in 1795 and 1797; he again returned to his native country in 1799, was there married, and revisited the United States with his family in the same year; continued to reside in New-York until 1802, when he again returned to Great Britain, and resided there until 1805, when he came to the United States, (his wife having died in Scotland,) formed a partnership with J. G. of New-York, and returned to Glasgow in the same year, where he carried on the business of the partnership under the firm of C. G. & Co.; remained there until the partnership was dissolved, and until July, 1813, (more than a year after the war had broken out between the United States and Great Britain,) at which time he left the enemy's country, and arrived in the United States in October of the same year, (after the capture, and before the final adjudication;) he kept house at Glasgow, and built a warehouse there, (which he still owned at the time of adjudication,) and kept his counting house therein: He formed a determination to return to the United States, as he deposed, on being informed of the declaration of war, but was prevented by his engagements and commercial concerns, from carrying that intention into effect, until the period above mentioned, still leav-

ing some of his affairs unarranged. Held, that his domicil at the time his goods were captured, determined the character of the property to be hostile, and liable to condemnation. *The Frances, Gillespie's claim, 8 Cranch, 363.*

211. The produce of an enemy's colony, is liable to capture and condemnation, so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or wherever he may reside. *Mr. Bentzon's claim to Thirty Hogsheads of Sugar, 9 Cranch, 191.*

212. An island, belonging to a friendly power, which has been subdued by the arms of the enemy, is to be considered as an enemy's colony, so long as it remains in his possession. Although acquisitions made during war are not considered as permanent until confirmed by treaty; yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. *Id. 195.*

213. The principles of the unwritten law of nations are fixed and rendered stable by a series of judicial decisions. The decisions of the Courts of every country, show how the law of nations, in the given case, is understood in that country; and will be considered with respect, though not received as authority, in adopting the rule which is to prevail in this country. *Id. 198.*

214. The United States having, at one time, formed a component part of the British empire, their prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it. *Ib.*

215. But any obvious misconstruction of public law, made by the British Courts, will not be considered as forming a rule for the Courts of the United States, nor is any recent rule of the British Courts entitled to more respect than the recent rules of other countries. *Ib.*

216. Where a rule is said to be founded upon a case solemnly decided before the Lords Commissioners in prize causes in 1783,

such rule cannot be considered as a recent rule, inapplicable in the Courts of this country, unless the case, on the authority of which it is said to rest, was determined contrary to former practice or former opinions, or to the rule of other nations in a similar case. *Mr. Benson's claim to Thirty Hogsheads of Sugar, 9 Cranch, 191. 195. 198.*

217. A merchant, having a fixed residence, and carrying on business at the place of his birth, does not acquire a foreign commercial character by occasional visits to a foreign country. *The Nereide, 9 Cranch, 414.*

218. In questions of salvage, the law of the country, where the party who claims restitution, is domiciled, without regard to his birth or allegiance, is the rule which is applied to determine, whether, and upon what rate of salvage, his property shall be restored on recapture. *The Adeline, 9 Cranch, 244. The Star, 3 Wheat. 74.*

219. Goods, the property of merchants actually domiciled in the enemy's country at the breaking out of a war, are subject to capture and confiscation as prize. *The Mary and Susan, claim of Richardson, 1 Wheat. 46. 54.*

220. The property of a house of trade in the enemy's country, is confiscable as prize of war, notwithstanding the neutral domicil of one or more of its partners. *The Antonia Johanna, 1 Wheat. 167, 188. The Freundschaft, Moreira, Claimant, 4 Wheat. 105. 107.*

221. The native character does not revert, by a mere return to his native country of a merchant, who is domiciled in a neutral country at the time of capture; who afterwards leaves his commercial establishment in the neutral country to be conducted by his clerks in his absence; who visits his native country merely on mercantile business, and intends to return to his adopted country. Under these circumstances, the neutral domicil still continues. *The Freundschaft, 3 Wheat. 14. 51.*

222. British subjects resident in Portugal, do not retain their native character, but acquire that of the country where they reside. *Id. 52.*

223. It seems, that where a native citizen of the United States emigrated before a declaration of war to a neutral country, there acquired a domicil, and afterwards returned to the United States during the war, and re-acquired his native domicil, he became a reintegrated American citizen; and could not afterwards, *flagrante bello*, acquire a neutral domicil by again emigrating to his adopted country. *The Dos Hermanos*, 2 Wheat. 76. 98.

224. The term, "subjects," in the 15th article of the Spanish treaty of 1795, when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens," or "inhabitants," when applied to persons owing allegiance to the United States, and extends to all persons domiciled in the Spanish dominions. *The Pizarro*, 2 Wheat. 227. 245.

225. Ships owned by Spanish subjects, domiciled in a foreign country, with which the United States are at war, cannot be protected by the treaty. *Ib.*

## PRIZE. V.

*Liability to capture for navigating under the enemy's license.*

226. The sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views or interests, constitutes such an act of illegality, as subjects the ship and cargo to confiscation as prize of war. *The Julia*, 8 Cranch, 181. 190. *The Aurora*, *Ib.* 203. *The Hiram*, 8 Cranch, 444. *The Ariadne*, 2 Wheat. 143.

227. A personal license is distinguishable from a general order of the enemy authorizing and protecting all trade to a neutral country. *The Julia*, 8 Cranch, 181. 196.

228. The passports, or safe-conducts, formerly granted to fishing vessels of enemies, were founded upon reciprocity or compact between the belligerent powers, and no argument can be drawn from them in favour of a license from the enemy to navigate and trade in furtherance of his views and interests. *The Julia*, 8 Cranch, 200.

229. The assignees of an enemy's license stand on the same footing, with the parties to whom it was originally granted. They are considered as entering into the views, and contracting to accomplish the intentions of the original grantee; and, at all events, the illegality of the use of the license indissolubly attaches to them. *The Julia*, 8 Cranch, 200.

230. It is an immaterial inquiry, whether the possession of a license from the enemy would or would not have protected the property from confiscation in his Prize Courts. It is sufficient if it was the reasonable expectation of the parties, and if they accepted the license with that view. *The Aurora*, 8 Cranch, 220.

231. The moment the vessel sails on a voyage with the enemy's license on board, the offence is consummated; there is no *locus penitentiae*; and she becomes instantly liable to capture! *Ib.*

232. The sailing with an enemy's license constitutes, of itself, an act of illegality, which subjects the property to confiscation, without regard to the object of the voyage or the port of destination. *The Ariadne*, 2 Wheat. 143. 147.

233. A vessel and cargo, which is liable to capture as enemy's property, or for sailing under the pass or license of the enemy, or for trading with the enemy, may be seized after her arrival in a port of the United States, and condemned as prize of war. The *delictum* is not purged by the termination of the voyage. *The Caledonia*, 4 Wheat. 100.

234. The circumstance of the vessel having been sent into an enemy's port, for adjudication, and afterwards permitted to resume her voyage, held to raise a violent presumption that she had a license from the enemy, which the claimant not having repelled by explanatory evidence, condemnation was pronounced. *The Langdon Cheves*, 4 Wheat. 103.

## PRIZE VI.

*Contraband, blockade, and resistance of visitation and search.*

235. There are many acts which inflict upon neutrals the penalty of confiscation, from the subserviency which they are supposed to indicate to enemy interests; the carrying of enemy despatches; the transportation of military persons, &c. The ground of those decisions is the voluntary interposition of the party to further the views and interests of one belligerent at the expense of another. *The Julia*, 8 Cranch, 198.

236. The ordinance of Congress, issued during the war of the revolution, by which the rule of free ships free goods was recognised, (with the exception of such neutral vessels as were employed in carrying contraband or soldiers to the enemy, and containing another article confining the term *contraband* to the articles therein mentioned, and provisions were omitted,) was not meant to protect from capture a neutral ship laden with provisions, and bound to a besieged place. Congress did not mean, by their ordinance, to ascertain in what cases the rights of neutrality should be forfeited, in exclusion of all other cases. *Darby et al. v. The Eastern*, (Federal Court of Appeals,) 2 Dall. 34.

237. Provisions, neutral property, but the growth of the enemy's country, and destined for the supply of the enemy's military or naval forces, are contraband. *The Commerce*, 1 Wheat. 382. 388.

238. Provisions, neutral property, and the growth of a neutral country, destined for the general supply of human life in the enemy's country, are not contraband. *Ib.*

239. Freight is never due to the neutral carrier of contraband. *Id.* 387. 394. 397.

240. Being engaged in the transport service of the enemy, or in the conveyance of military persons in his employ, or of despatches, are acts of hostility which subject the property to confiscation. *Id.* 391. 404, 405.

241. A neutral ship, laden with a cargo of provisions, the property of the enemy, specially permitted to be exported for the supply of his forces, is not entitled to freight. *The Commercœn*, 1 Wheat. 382.

242. It makes no difference, in such a case as the above, that the enemy is carrying on a distinct war in conjunction with his allies, who are in amity with the country of the captor, and that the provisions are intended for the supply of the enemy's troops engaged in that distinct war, and that the ship in which the provisions are transported belongs to subjects of one of those allies. *Id.* 393.

243. The fact of clearing out for a blockaded port, is in itself innocent, unless it be accompanied with knowledge of the blockade. *Fitzsimmons v. Newport Ins. Co.* 4 Cranch, 185. 198.

244. Persisting in the intention to enter a blockaded port, after warning by the blockading force, is not an attempt to enter, nor a breach of the blockade, unless connected with some act on the part of the vessel. *Ib.*

245. Lingering about the blockaded place, as if watching for an opportunity to sail into it, or the single circumstance of not making immediately for some other port, or possibly obstinate and determined declarations of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter the blockaded port. *Ib.*

246. Quære, Whether sailing for a blockaded port, knowing it to be blockaded, be an attempt to enter; and whether it is to be adjudged a breach of the blockade from the departure of the vessel? *Ib.*

247. Sailing to a blockaded port, not knowing it to be blockaded, is not a breach of the blockade. *Yeaton v. Fry*, 5 Cranch, 335. 343.

248. It seems to be a duty, in ordinary cases, to make inquiry in the neighbourhood, if information be attainable, respecting the continuance of a blockade known previously to exist. *Maryland Ins. Co. v. Wood*, 6 Cranch, 29. 48.

249. The British order of the 5th of January, 1804, "not to

consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them;" was a mitigation of the general rule as to blockades, and under it a vessel might lawfully sail for a blockaded port, knowing it to be blockaded, and was not liable for a breach of blockade until warned off. *Maryland Ins. Co. v. Wood*, 6 *Cranch*, 29. 48.

250. The letter of the British minister in the United States, of the 12th of April, 1804, extended to the island of Curracoa, the above order respecting Martinique and Guadalupe. *The Maryland Ins. Co. v. Wood*, 7 *Cranch*, 402.

251. The right to blockade an enemy's port with a competent force, is a right secured to every belligerent by the law of nations. *M'Call v. Marine Ins. Co.* 8 *Cranch*, 59. 65.

252. No neutral can, after knowledge of a blockade, enter, or attempt to enter, the blockaded port, without subjecting the property to the penalty of confiscation. *Ib.*

253. The act of sailing, with an intention to break a blockade, is a sufficient breach to authorize confiscation, although at the moment of capture the ship be driven, by stress of weather, in a different direction from the port of destination. *The Nereide*, 9 *Cranch*, 440. 446.

254. A blockade does not, according to modern usage, extend to a neutral vessel, found in port, nor prevent her coming out with the cargo which was on board when the blockade was instituted. *Olivera v. The Union Ins. Co.* 3 *Wheat.* 194.

255. The right of search grows out of, and is ancillary to, the greater right of capture. *The Nereide*, 9 *Cranch*, 428.

256. The resistance of a convoy, is the resistance of all the ships associated under the common protection, without any distinction whether the convoy belong to the same or another neutral sovereign. S. C. 429. 439. *The Atalanta*, 3 *Wheat.* 423.

257. The right of visitation and search, is an unquestionable belligerent right; but it must be conducted with as much regard

to the safety of the vessel detained, as is consistent with a thorough examination of her character and voyage. *The Anna Maria*, 2 Wheat. 327, 332.

## PRIZE VII.

*Trade with the enemy, and breach of municipal law.*

258. The making of remittances in satisfaction of debts, although to subjects of a nation at war, is no violation of the duties of a citizen. Goods shipped by a citizen to a friendly country, with an avowed intention to remit the proceeds to the enemy's country for the payment of debts, would not be prize on capture by a fellow citizen. *Miller v. The Resolution*, (Federal Court of Appeals,) 2 Dall. 12.

259. After a declaration of war, a citizen cannot lawfully send a vessel to the enemy's territory to bring away goods, his property, and purchased before the war. *The Rapid*, 8 Cranch, 155. 162.

260. By the law of prize, a hostile character is attached to trade, independently of the character of the trader. A citizen or ally may be engaged in a hostile trade, and thereby subject his property to condemnation as prize. *Ib.*

261. Every thing that issues from the enemy's country, is, *prima facie*, the property of the enemy; and the *onus probandi* is on the claimant to show the contrary. *Ib.*

262. But if the claimant be a citizen or an ally, at the same time that he proves his proprietary interest, he confesses an offence, which takes away his *persona standi in iudicio*, and deprives him of his right to claim. *Ib.*

263. The illegality of trade by a subject or citizen with an enemy, is universally recognized by commercial nations. It was the acknowledged law of the former Court of Appeals in Prize Causes; it was the law of England before the revolution, and, therefore, constitutes a part of the Admiralty and Maritime

jurisdiction conferred on the United States judiciary, in pursuance of the constitution. *The Rapid*, 8 Cranch, 155. 162.

264. By *trading*, in prize law, is not meant, that signification of the term which consists in negotiation or contract. The object, policy, and spirit of the rule prohibiting trade with the enemy, is to cut off all communication and locomotive intercourse between individuals of the belligerent states. Intercourse inconsistent with actual hostility, is the offence against which the operation of the rule is directed. *Ib.*

265. *Quære*, Whether on the breaking out of war, a citizen has a right to remove from the enemy's country to his own with his property? *Id.* 163.

266. A citizen has not a right, on the breaking out of war, to leave the United States for the purpose of bringing home his property from an enemy country. *Ib.*

267. A vessel owned by citizens of the United States sailed from Naples on the 22d of June, 1812, with a cargo, and a British license to carry the same from Naples to England. She touched at Gibraltar, and there left part of her cargo, and sailed from thence for the United States. On the 3d of August, 1812, she heard of the war between the United States and Great Britain, and changed her course for England. She was afterwards captured by the British, sent into Ireland, acquitted, and there disposed of her cargo. She then proceeded to Liverpool, and took in a cargo purchased with the proceeds of the cargo brought from Naples, and sailed from Liverpool for Boston on the 9th of May, 1813. On the 2d of June following she was captured by a privateer of the United States, and brought in for adjudication. *Held*, that this was an illegal trading with the enemy. Vessel and cargo condemned as prize to the captors. *The Alexander*, 8 Cranch, 169.

268. It seems, that the purchase of goods of enemy manufacture, and avowedly belonging to an enemy, is not legalized by the mere fact of the sale being made in a neutral port. The goods must have become incorporated into the general stock of neutral

trade before a citizen can lawfully become a purchaser. *The Julia*, 8 Cranch, 196.

269. It is not universally true, that a destination to a neutral port gives a *bona fide* character to the voyage. If the property be ultimately destined for an enemy port, or an enemy use, the interposition of a neutral port will not save it from condemnation. *Id.* 200.

270. Strictly speaking, in war, all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the Government, or in the exercise of the duties of humanity. *The Julia*, 8 Cranch, 193, 194.

271. By the law of France and England, all trade with an enemy is prohibited, under the penalty of confiscation as prize of war. *Ib.*

272. No contract with an enemy is valid, at least so far as to give him a remedy in the Courts of either country. While he continues an enemy, he has no *persona standi in judicio*. *Ib.*

273. There is no difference between a direct intercourse by a citizen with the enemy's country, and an intercourse through the medium of a neutral port. The latter is as strictly prohibited as the former. *The Julia*, 8 Cranch, 195.

274. Citizens of the United States are equally guilty of trading with the enemy, whether the trade be carried on between an enemy's port and the United States, or between such port and any foreign country. *The Rogen*, 1 Wheat. 74.

275. If property be engaged in an illegal traffic with the enemy, or even in an attempt to trade, it is liable to confiscation, as well on the return as on the outward voyage. *The Julia*, 8 Cranch, 202, 203.

276. It may be assumed as a proposition, liable to few, if any exceptions, that the property which is rendered auxiliary or subservient to enemy interests, becomes tainted with forfeiture. *Ib.*

277. Property captured in an illegal intercourse with the enemy, is considered as enemy's property, whether it belongs to a

citizen or an ally, and is condemned, not to the government, but to the captors. *The Sally*, 8 *Cranch*, 382.

278. If one of two partners in a house of trade in this country obtain a United States' register for a ship, by swearing that he, together with his partner, *of the city of New-York*, are the sole owners of the vessel for which the register is obtained, when in fact his partner is domiciled in England, the vessel is liable to forfeiture under the registry act of December 31st, 1792, c. 146. [i.] and if proceeded against as prize of war, will be condemned as such, although no claim for the forfeiture be interposed by the United States. *The Venus*, 8 *Cranch*, 253. 276.

279. A municipal forfeiture under the laws of the United States is absorbed in the more general operation of the law of war, and property which is liable to such forfeiture, if captured, is condemned to the captors. *Ib.*

280. A vessel sailing to the enemy's country, after the existence of war is known, and bringing away a cargo laden in the enemy's country, is guilty of trading with the enemy, and being taken on her way from the enemy's port, is liable to confiscation as prize of war, whether she belongs to citizens or enemies. *The St. Lawrence*, 8 *Cranch*, 434.

281. Quære, Whether a citizen, having funds in the enemy's country, has a right to withdraw them after a declaration of war? And, what latitude he may be allowed in the exercise of that right, if it exists? *Ib.*

282. The sailing with a cargo, on freight, from a neutral port to the enemy's country, after a knowledge of the war, amounts to such a trading with the enemy as to subject both the vessel and cargo to condemnation as prize of war, if captured whilst proceeding on that voyage. *The Joseph*, 8 *Cranch*, 451. 454.

283. The alleged necessity of undertaking such a voyage to enable the master, out of the freight, to discharge his expenses at the neutral port, countenanced, as the master declared, by the opinion of the minister of the United States, at a foreign court, that by undertaking such a voyage he would violate no

law of the United States, affords no legal excuse which this Court could admit as the basis of its decision. *The Joseph, 8 Cranch, 451.* 454.

284. If a vessel be taken during the same voyage in which the offence was committed, though after it was committed she is considered as being *in delicto*, and subject to confiscation. *Id. 454.*

285. Where the voyage was an entire one from the United States to England, thence to the north of Europe, and thence directly or indirectly to the United States; even admitting that the outward and homeward voyages could be separated, (which was not conceded,) still the termini of the homeward voyage were *St. Petersburg* and the *United States*. The continuity of such a voyage cannot be broken by voluntary deviation of the master for the purpose of carrying on an intermediate trade. Therefore, where the vessel, in such a voyage, was captured on its return to the United States from the enemy's port, in ballast, having deposited a cargo taken in at the neutral port, it was condemned as prize of war for the offence of trading with the enemy. *Ib.*

286. *Quære,* As to the right of a citizen, on the breaking out of hostilities, to withdraw his property purchased before the war, from an enemy country? *The St. Lawrence, 9 Cranch, 120.*

287. Admitting such right to exist, it is necessary that it should be exercised with due diligence, and within a reasonable time after the knowledge of hostilities. *Ib.*

288. Where a shipment was made from the enemy's country more than eleven months after the declaration of war, it was held to be too late for the party to make the shipment, so as to exempt him from the penalty attached to an illegal traffic with the enemy. *Ib.*

289. The subject of a State at war, cannot, under cover of neutral muniments, however regularly procured or formal they may be, carry on a trade with the enemy, in violation of his duty and allegiance to his own country. *The Rugen, 1 Wheat. 62.* 67.

## PRIZE VIII.

*Ransoms, recapture, and salvage.*

290. An ally in the war is bound by a ransom-bill, given by a co-belligerent to a captured vessel. *Miller v. The Resolution*, (*Federal Court of Appeals*), 2 Dall. 15.

291. An attempt by a neutral master, to rescue a vessel, captured by a belligerent, is cause of condemnation, and it is no part of the duty of the master to make such attempt. *The Short Staple v. United States*, 9 Cranch, 55. 63.

292. A capture authorized by the rights of war, i. e. of enemy's property, transfers the property to the captor. *Miller et al. v. The Resolution*, (*Federal Court of Appeals*), 2 Dall. 1, 2. 4.

293. The ordinance of Congress, during the war of the revolution, declaring that after a capture and occupation for twenty-four hours by the enemy, the property shall be considered as changed, was a mere municipal regulation of the *jus postliminii*, relating only to citizens of the United States. *Ib.*

294. By the law of nations, the property captured is transferred to the captors as soon as taken, as between belligerents. *Ib.*

295. The municipal laws of a particular country cannot change the law of nations, so as to bind the subjects of another nation; and by the law of nations a neutral subject, whose property has been illegally captured, may pursue and recover that property, in whatever country it is found, unless a competent jurisdiction has adjudged it prize. *Ib.*

296. The ordinance of Congress, and the similar ordinance of France, therefore, related only to property captured from a citizen or subject, and re-captured; and not to property captured from a neutral, and recaptured. *Ib.*

297. Salvage allowed to a United States ship of war, for the re-capture of a Hamburg vessel out of the hands of the French, (the United States and France being in a state of partial war,

and Hamburg neutral,) on the ground that the captured vessel was in danger of condemnation under the French decree of the 18th of January, 1798, declaring every vessel good prize, which should be found at sea, loaded, in whole or in part, with merchandise the production of England or her possessions. *Talbot v. The Amelia*, 4 Dall. 34. S. C. 1 Cranch, 1.

298. Salvage is a compensation for actual service rendered to the property charged with it. It is demandable of right for vessels saved from the enemy, or from pirates. *Talbot v. Seaman*, 1 Cranch, 28.

299. A salvage of one half allowed for the re-capture by a United States ship of war of a vessel belonging to citizens of the United States, which had been captured by the French, and retaken after a possession by them of above ninety-six hours, after the passage of the act of the 2d of March, 1799, c. 130. and before the passage of the navy salvage act of the 3d of March, 1800, c. 168. by which the former laws concerning re-captures were repealed. *Bas v. Tingey*, 4 Dall. 37.

300. The act of the 2d of March, 1799, c. 130. [ciii.] virtually worked a repeal of the act of the 28th of June, 1798, by which a salvage of one eighth is given without regard to the length of possession by the enemy. *Ib.*

301. The term *enemy*, in the act of the 2d of March, 1799, c. 130. [ciii.] was descriptive of *France*, in her existing relations with the United States at that time; and the rate of salvage prescribed by that act was applicable to recaptures of the property of citizens of the United States from her cruisers. *Ib.*

302. The act of the 2d of March, 1799, c. 130. [ciii.] was not made in relation to the (then) present war with France only, but in relation to any future war with her, or any other country; and whenever such a war should exist between the United States and France, or any other nation, as according to the law of nations, or special authority, would justify the recapture of friendly vessels, it would apply to them. *Ib.*

303. To support a demand for salvage, two circumstances must concur; the taking must be lawful, and there must be a

meritorious service rendered to the recaptured. *Talbot v. Seeman*, 1 *Cranck*, 28.

304. On a recapture made by a neutral power, no claim for salvage can arise. *Ib.*

305. That to give a title to salvage, the means used must not only have produced the benefit, but must have been used with that sole view, is not a principle applicable to military salvage. *Ib.*

306. The rule that a neutral vessel is to be restored without paying salvage, is founded exclusively on the supposed safety of the neutral. *Ib.*

307. But if the neutral be liable to condemnation in the Courts of the belligerent by whom he is captured, salvage is due upon recapture. *Ib.* *Murray v. The Charming Betsey*, 2 *Cranck*, 64. 121.

308. To entitle to salvage, it is not necessary that the loss should be inevitably certain; it is only necessary that the danger should be real and imminent. *Talbot v. Seeman*, 1 *Cranck*, 42.

309. The act of the 2d of March, 1799, c. 130. [ciii.] giving a salvage of one half on ships and goods belonging to citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, retaken from the enemy, did not apply to the recapture of a neutral in danger of condemnation by the French Courts. The salvage, in such case, held to be discretionary, and one sixth allowed under the circumstances of the case. *Ib.* 43, 44.

310. The act of the 2d of March, 1799, c. 130. [ciii.] allowing the salvage of one half on vessels recaptured from the enemy in certain cases, applies only to cases where the recapture is from an enemy of both parties, or of the nation to which the recaptured ship belongs, and of the nation of the recapturing ship. *Ib.* 1.

311. As between belligerents, capture produces a complete devesture of property. Nothing remains to the original proprietor but a mere *scintilla juris*, the *spes recuperandi*. *The Adventure*, 3 *Cranck*, 226.

312. By the salvage act of the 3d of March, 1800, c. 168. [xiv.] the cargo pays the same rate of salvage as the vessel, if recaptured by a public ship, by the express words of the law; but if by a privateer, only one sixth part is allowed for salvage upon the recapture of the cargo in an armed vessel; although one half be allowed for the recapture of the vessel. *The Adeline, 9 Cranch, 244.* 287.

313. By the salvage act, as well as by the general maritime law, the rule of reciprocity is to be applied to recaptures of the property of friends. If the law of the friendly nation would restore in a like case, then we are bound to restore; if otherwise, then the whole property must be condemned to the recaptors. *Id. 288. The Star, 3 Wheat. 91, 92.*

314. The law of France, adjudging the whole property good prize to the recaptors, after it has been twenty-four hours in the enemy's possession, whether it belongs to her subjects, to her allies, or to neutrals, the same rule was applied in this Court to the case of the property of persons domiciled in France, recaptured by a private armed vessel of the United States, after being in the enemy's possession more than twenty-four hours; while the property of persons domiciled in the United States, taken on board the same vessel, was restored, on payment of one sixth for salvage. *The Adeline, 9 Cranch, 244.*

315. Salvage is allowed as a reward for the meritorious conduct of the salvor, and in consequence of a benefit conferred on the person whose property he has saved. *The Alerta, 9 Cranch, 367.*

316. A merchant vessel of the United States was captured by the enemy, and after condemnation and sale to a subject of the enemy, was recaptured by a private armed vessel of the United States. Held, that the former owner was not entitled to restitution on payment of salvage, under the salvage act of the 3d of March, 1800, c. 168. [xiv.] and the prize act of the 26th of June, 1812, c. 430. [cvii.] *The Star, 3 Wheat. 78.*

317. By the general maritime law, a sentence of condemnation

completely extinguishes the title of the original proprietor. *The Star, 3 Wheat.* 86.

318. By the British statute of 13th George II. c. 4. the *jus postlimini* is reserved to British subjects, upon all recaptures of their vessels and goods by British ships, even though they have been previously condemned, except where such vessels, after capture, have been set forth as ships of war. *Id.* 88.

319. The statute of the 43d George III. c. 160. s. 39. has no farther altered the previous British laws of salvage, than to fix the salvage at uniform stipulated rates, instead of leaving it to depend upon the length of time the recaptured ship was in the hands of the enemy. *Ib.*

320. None of the British salvage acts extend to neutral property. *Ib.*

321. The 5th section of the prize act of the 26th of June, 1812, c. 430. [cvii.] does not repeal any of the provisions of the salvage act of the 3d of March, 1800, c. 168. [xiv.] but is merely affirmative of the pre-existing law. *Id.* 89.

### PRIZE IX.

#### *Treaty of peace.*

322. A final condemnation in an inferior Court of prize, where an appeal has been entered, is not a *definitive* condemnation within the 4th article of the convention of 1800, between the United States and France, stipulating for the mutual restitution of "property captured and not yet *definitively condemned.*" *The United States v. The Peggy, 1 Cranch,* 103.

323. The Prize Court is bound to take notice of a treaty, and to reverse an original decree of condemnation, (although correct when pronounced,) and to restore property under the stipulations of the treaty made since the capture and condemnation in the inferior Court. *Ib.*

324. Where individual rights, acquired by war, are sacrificed by treaty for national purposes, the treaty is to receive a con-

struction according to its manifest import, and to be carried into effect by the Courts; and it is for the government to consider whether it be a case proper for compensation to the citizens whose vested rights have been given up. *The United States v. The Peggy, 1 Cranch, 103.*

325. The Courts of the United States will not enforce an agreement made in fraud of a prize law of the United States, subsisting during a war, although the agreement was made between persons who were then enemies, and its object was a mere stratagem of war, and the suit was brought on it after the peace. *Hannay v. Eve, 3 Cranch, 242.*

326. Where it appeared in the appellate Court, that the vessel, which had been condemned as prize in the Court below, was captured subsequent to the operation of the preliminary articles of the peace of 1783, the decree of condemnation was reversed. *Bain et al. v. The Speedwell et al. (Federal Court of Appeals,) 2 Dall. 40.*

327. A treaty of peace abolishes the subject matter of the war, and after peace is concluded, neither the matter in dispute, nor the conduct of either party, during the war, can be revived, or brought into contest again. *Ware v. Hylton, 3 Dall. 199. 230. Per Chase, J.*

328. If a nation, during a war, conducts herself contrary to the law of nations, and no notice is taken of such conduct in the treaty of peace, it is thereby so far considered lawful, as never afterwards to be revived, or to be a subject of complaint. *Ib. Per Chase, J.*

329. The restitution of, or compensation for, enemy's property, or debts due to the enemy, confiscated, or extinguished during the war, can only be provided for by the treaty of peace; and if there be no provision respecting these matters in the treaty, they cannot be agitated after the peace, by the enemy's government, much less by his subjects, in Courts of justice. *Ib. Per Chase, J.*

330. Though the sovereign power may be authorized to give up rights fully acquired by private persons during war, more

especially if derived from the laws of war only against the enemy, yet such a concession is not to be presumed to have been intended, under the operation of general words, not making such a construction unavoidable. *Bain et al. v. The Speedwell et al. (Federal Court of Appeals,) 2 Dall. 279. Per IREDELL, J.*

331. Debts due to British subjects before the war of the revolution, though sequestered, or paid into the State treasuries, revived by the terms of the treaty of peace of 1783, and the creditors were entitled to recover them from their original creditors. *Id. 189.*

## PRIZE X.

*Practice of the Prize Court.*

332. The distribution of the prize proceeds is generally directed by the agreement between the owners, officers, and crew; but if no agreement is executed, the Admiralty Court will make distribution in proportion to the number, interest, and merits of the captors. *Keane et al. v. The Gloucester, (Federal Court of Appeals,) 2 Dall. 37.*

333. The crew of a privateer are entitled to a supplemental libel to enforce the distribution of the prize proceeds. *Ib.*

334. If the marshal makes a distribution, without the order of the Prize Court, he does it at his peril. The list, or return, of the crew, by the master, is no justification for his payments. If he would act safely, he ought, before he makes his payments, to obtain the order and direction of the Court. *Ib.*

335. The right of the crew of a privateer, to a distribution of the prize proceeds, is not founded on the agreement between them and the owners, but on the privateer's commission; and, therefore, where a part of the crew were shipped and received on board, and afterwards causelessly turned on shore by the master, they were held entitled to a full proportion of the prizes captured during the cruise. *Ib.*

336. The execution of new articles, by the officers and the residue of the crew, after such causeless dismission, cannot affect the original articles, nor deprive that part of the crew who are dismissed of their due proportion of prizes according to the original agreement. *Keane et al. v. The Gloucester*, (Federal Court of Appeals,) 2 Dall. 39.

337. A prize agent who pays over the prize proceeds, pending an appeal, or an appeal improperly refused, is liable therefor. *Penhallow et al. v. Doane*, 3 Dall. 54. 37.

338. A prize agent is only responsible for the prize proceeds which have come into his own hands, and not for the proceeds which have been received by his co-agents. *Penhallow et al. v. Doane*, 3 Dall. 54. 88.

339. Interest is allowed against a prize agent, where the money has been unjustifiably detained. *Ib.*

340. An appeal itself suspends the decree of the inferior Court; but an inhibition is necessary to bring the inferior Court into contempt, in case of disobedience. *Penhallow et al. v. Doane*, 3 Dall. 87. 118.

341. The want of a monition to appear, is cured by actual appearance. *Penhallow v. Doane*, 3 Dall. 87.

342. The death of any of the parties to a prize cause, does not abate the suit, nor avoid the judgment. *Penhallow v. Doane*, 3 Dall. 88. 101.

343. Damages for an illegal capture are to be assessed against parties, who were mere commercial agents, without any share in the ownership of the privateer making the capture, or participation in the direction or emoluments of her cruising, only for so much of the proceeds as actually come into their hands. *Hills v. Ross*, 3 Dall. 331.

344. The public laws of a foreign nation, on the subject of prize, promulgated by the governing powers of another country, may be read in evidence before the Admiralty Courts of that country. *Talbot v. Seeman*, 1 Cranch, 88.

345. The sentence of a foreign Court of prize proves nothing more than its own correctness, and does not establish any parti-

cular fact, without which the sentence may have been rightly pronounced. *Maley v. Shattuck*, 3 *Cranch*, 458. 408.

346. A vessel libelled as enemy's property, is condemned as prize, for resistance of search, breach of blockade, or any other act which forfeits her neutral character, although it may be proved that she is the property of a friend. *Ib.*

347. The title of property is left open by such a condemnation, for investigation in any Court where it may come in question. *Ib.*

348. A captor, who is liable for damages on account of a seizure without probable cause, is not excused therefrom by the recapture of the vessel by a superior force; and the original proprietor is not bound to resort to the recaptor, but may abandon, and hold the first captor liable for the whole loss. *Maley v. Shattuck*, 3 *Cranch*, 458. 491.

349. The custody and control of the captured property is a power inherent in the Prize Court. *Jennings v. Carson*, 4 *Cranch*, 2. 23.

350. The Court possesses the power of selling the property while the cause is depending, and after an appeal from its sentence. *Jennings v. Carson*, 4 *Cranch*, 26.

351. The property does not follow the appeal into the superior Court, but still remains in custody of the officer of that Court in which it was libelled. *Ib.*

352. A commander of a ship of war of the United States, in obeying instructions received from the President, acts at his peril: if those instructions are not authorized by law, the commander is responsible in damages to the injured party. *Little et al. v. Barreme et al.* 2 *Cranch*, 170. 179.

353. A sentence of a foreign Prize Court, declaring the vessel "to have been cleared out for Cadiz, a port actually blockaded by the arms of our sovereign lord the king, and that the master of said brig persisted in his intention of entering said port, after warning from the blockading force not to do so, in a direct breach and violation of the blockade thereby notified"—is not conclusive evidence of a breach of blockade, according to the

law of nations, and the treaty of 1794, between the United States and Great Britain. *Fitzsimmons v. Newport Ins. Company*, 4 *Cranch*, 185. 198.

354. The sentence of a foreign Court of Admiralty condemning a vessel for attempting to break the blockade of Martinique, is conclusive evidence, not only of the change of the right of property effected by the sentence, but evidence of the fact that the blockade was actually broken. *Croudson v. Leonard*, 4 *Cranch*, 434.

355. The property in a neutral vessel captured as an enemy, is never changed until sentence of condemnation has passed. *Hudson v. Guestier*, 4 *Cranch*, 295.

356. Quære, Whether a seizure, by a non-commissioned captor, on land, of enemy's property liable to seizure and condemnation, ought to be proceeded against as prize, or by a process applicable to municipal confiscations? *Brown v. United States*, 8 *Cranch*, 139.

357. The master can never be heard, in a Prize Court, to aver his ignorance of the documents of his ship. It is his duty to know what they are. *The Julia*, 8 *Cranch*, 491.

358. Where the papers found on board have been fraudulently subtracted, not by the captors, copies duly verified may be admitted in evidence on the original hearing. *The Julia*, 8 *Cranch*, 492.

359. Where the captured property was in a perishing condition, a sale was ordered by the appellate Court for the use of those to whom the same should be finally decreed, on motion of the appellant, and before the appearance of the appellee. *Stoddard v. Read and the Schooner Squirrel*, (Federal Court of Appeals,) 2 *Dall.* 40.

360. In estimating damages upon an illegal seizure, the prime cost of the vessel and cargo, with all charges, and the premium of insurance, where it has been paid, or the value of the property lost at the time of loss, or in case of injury, the diminution in value by reason of the injury, with interest, are to be considered as the standard by which the damages ought to be mea-

sured. *Del Col v. Arnold*, 3 *Dall.* 333. *Murray v. The Charming Betsey*, 2 *Cranck*, 125. *Maley v. Shattuck*, 3 *Cranck*, 491. *The Anna Maria*, 2 *Wheat.* 327. 335. *The Amiable Nancy*, 3 *Wheat.* 546. 560.

361. The report of commissioners, appointed by the Court to assess the damages in a case of illegal seizure, ought to show how the account was made up, and on what principles the sum given as damages was assessed. A report giving a gross sum in damages, unaccompanied by any explanation of the principles on which that sum was given, is insufficient. *Murray v. The Charming Betsey*, 2 *Cranck*, 124.

362. The term *probable cause*, according to its usual acceptance, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. In its legal sense, it imports a seizure made under circumstances which warrant suspicion. *Locke v. The United States*, 7 *Cranck*, 339. 348.

363. By the general law of prize, property engaged in an illegal intercourse with the enemy, is deemed enemy property. It is of no consequence whether it belongs to an ally or a citizen; the illegal traffick stamps it with the hostile character, and attaches to it all the penal consequences of enemy ownership. Such property must be condemned as prize to the captors, and not to the United States. *The Sally*, 8 *Cranck*, 382.

364. Where property was captured as prize, and the United States claimed priority of right to it upon the ground of an antecedent forfeiture to the United States, for a violation of the non-intercourse act of the 1st of March, 1809, c. 195. [xci.] the goods having been put on board at a British port with intent to import the same into the United States; held, that the municipal forfeiture, under the non-intercourse act, was absorbed in the more general operation of the law of war: and that even if the doctrine were otherwise, the prize act of the 26th of June, 1812, c. 430. [cvii.] operated as a grant from the United States of all property rightfully captured by commissioned privateers as prize of war. Condemnation to the captors. *Ib.*

365. Farther proof, which is inconsistent with the documentary evidence found on board, is inadmissible: *The Euphrates*, 8 *Cranch*, 385.

366. A sentence of a Court of Admiralty not only binds the subject matter on which it is pronounced, but proves conclusively the facts which it asserts. *The Mary*, 9 *Cranch*, 126. 142.

367. But where the vessel and cargo were libelled, in a District Court of the United States, as prize of war, and no claim being put in for the vessel, she was condemned as enemy's property; the sentence of condemnation of the vessel was held not to be conclusive against the claimants of the cargo, in an incidental question, arising in the appellate Court. *Id.* 142.

368. The owner of the cargo cannot be prejudiced by the contumacy of the owner of the vessel. That contumacy ought not to prevent the Court, (whether it be the same or an appellate tribunal,) from looking into testimony concerning proprietary interest in the vessel, so far as the rights of the claimants of the cargo depend on that interest. *Id.* 143.

369. It is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. *Ib.*

370. Where the proceedings are *in rem*, notice is served upon the thing itself. This is necessarily a constructive notice of the seizure to all who have any interest in the thing, and who can assert any title to it. Every such person may fairly be considered as a party to the libel. *Ib.*

371. But where a vessel and the cargo are libelled, those who have no interest in the vessel which could be asserted in the Court of Admiralty, have no notice of the seizure, and cannot be considered as parties in the cause so far as respects the vessel. And if a re-examination of the facts respecting the vessel, becomes incidentally necessary on the adjudication of the cargo, claimed by another party, such re-examination may take place, either in the same or a different Court. *Ib.*

372. The doctrine of the conclusiveness of a foreign sentence rests on three considerations: 1st. The propriety of leaving the cognizance of prize questions exclusively to Courts of Prize jurisdiction; 2dly. The very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in a Court of common law; and, 3dly. The impropriety of revising the decisions of the maritime Courts of other nations, whose jurisdiction is co-ordinate throughout the world. *Croudson v. Leonard*, 4 *Cranch*, 434.

373. The captors are entitled to their costs and expenses wherever there is probable cause of seizure. *The Mary*, 9 *Cranch*, 126. 151.

374. A claim on the part of alleged joint captors cannot be received in this Court, but must be made in the Circuit Court, to which the cause will be remanded for that purpose. *The Societe*, 9 *Cranch*, 209. 212.

375. In prize causes, the allegations, proofs, and proceedings, are, in general, modelled upon the civil law, with such additions and alterations, as the practice of nations, and the rights of belligerents and neutrals, unavoidably impose. *The Adeline*, 9 *Cranch*, 244. 284.

376. Where merits clearly appear on the record, it is the settled practice, in Admiralty proceedings, not to dismiss the libel, but to allow the party to assert his rights in a new allegation. *Id.* 284.

377. In cases of military salvage, the party may, if he please, distinctly allege and claim salvage in his libel. But it is unnecessary, and in most cases would be highly inexpedient. A general prize allegation is sufficient. *Id.* 284.

378. Where goods are taken on the high seas, *jure bellici*, they are to be proceeded against, in a Court of Prize, as enemy's property. The Court having a legitimate jurisdiction over the property as prize, will exert its authority over all the incidents. It will decree restitution of the whole or of a part; it will decree it absolutely, or burthened with salvage, as the circumstances of the case may require. *Id.* 285.

379. The test affidavit should state, that the property, at the time of shipment, and also at the time of capture, did belong, and that it will, if restored, belong to the claimant; but an irregularity in this respect is not fatal; and may, in general, be removed by an amendment. *The Adeline*, 9 *Cranch*, 244. 284. 286.

380. Such an irregularity might, in a doubtful or suspicious case, or in a case calling for the application of the doctrine as to the legal effect of changes of property *in transitu*, justify an order for farther proof: or, in a case of gross negligence, or pregnant fraud, draw upon the party more severe consequences. *Ib.*

381. A test affidavit, by an agent, is not sufficient, if the principal be within the country, and within the reasonable reach of the Court. *Ib.*

382. But such an irregularity, if passed over in silence in the Court below, will be disregarded in this Court. *Id.* 287.

383. Farther proof is required, where the master cannot swear directly to the proprietary interest of the cargo, but merely says, that the goods are, as he presumes and believes, the property of the shippers or the consignees. *Id.* 288.

384. But where the captors, in such a case, had omitted to move for farther proof in the Courts below, and this Court was satisfied in relation to the claims restored, it was considered useless then to make an order for farther proof as to the whole cargo. *Ib.*

385. Farther proof, relative to the circumstances of the capture, may be extended to the captors as well as the claimants. *The Grotius*, 9 *Cranch*, 368.

386. The legality of a capture is open for question and examination, till a competent jurisdiction has decided the question, and a decree passes for condemnation as prize; then, and not before, all farther questions and examinations are precluded; then, all parties and all foreign Courts, are estopped to say, "the capture is not legal;" and if the decree be erroneous or iniquitous, the party injured must apply for redress to that na-

tion, whose Courts have committed the error or iniquity. *Miller et al. v. The Resolution*, (*Federal Court of Appeals*,) 2 Dall. 5.

387. A title by possession and occupation is a good and valid title, in a Court of Prize, against all the world, except the right owner. *Ib.*

388. The papers found on board are admitted by the law of nations, as *prima facie* evidence, on the question of prize or no prize; and it is on this evidence that the captured property is generally acquitted or condemned. *Id.* 23.

389. The omission of the captors to bring or send in the master of the captured vessel, for examination touching the property, &c. and their omission to produce all the ship's papers, will not prevent or reverse a condemnation, unless it appears that substantial justice has been thereby prevented. *The Chester v. The Experiment*, (*Federal Court of Appeals*,) 2 Dall. 41. 42.

390. A decree or sentence may be *interlocutory* or *final*, in the Court which pronounces it, and receives either appellation according as it determines the power of that particular Court over the subject to which it applies, or is only an intermediate order, subject to the future control of the same Court. But a stipulation in a treaty for the restitution of "property captured and not yet *definitively condemned*," extends to a case where the sentence of condemnation, though final in the Court where it was pronounced, had been appealed from, and the sentence of the superior Court was not yet pronounced. *The United States v. The Peggy*; 1 Cranch, 103. 108.

391. It is the duty of the appellate Court in such a case not only to inquire, whether the sentence of the Court below was erroneous when delivered, but to restore the property which, not being yet *definitively condemned*, is directed by a treaty, which is the supreme law of the land, to be restored to the former owners. *Id.* 109.

392. It is in general true, that the province of an appellate Court is only to inquire whether a judgment, when rendered, was erroneous or not: But if, subsequent to the judgment, and before the decision of the appellate Court, a law intervenes and

positively changes the rule which governs, the law must be obeyed, if constitutional. *The United States v. The Peggy*, 1 Cranch, 103. 108. 110.

393. In great national contests, where individual rights acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the Courts, but for the Government, to consider whether it is a case proper for compensation. *Ib.*

394. The sentences of Prize Courts, whether of condemnation or restitution, in all matters of prize jurisdiction, are completely binding upon the judgment of every other Court where the same subject matter comes incidentally in controversy. *Gelston v. Hoyt*, 3 Wheat. 315.

395. Where goods were shipped by neutrals on board an enemy's vessel on a voyage from Teneriffe to London, and the vessel and cargo were captured and brought into a port of the United States for adjudication. Pending the prize proceedings, the goods were sold by an order of the District Court, and the proceeds brought into the registry. A decree of restitution to the claimants being finally pronounced, it was held that the goods, having been sold and consumed in the country, or incorporated into the general mass of its property, became liable to the payment of duties. *The Concord*, 9 Cranch, 387.

396. In the above case, if the goods had been specifically restored, and afterwards withdrawn from the United States by the claimants, they would have been exempt from duties. *Ib.*

397. A claimant, in his answer to the 12th standing interrogatory, said, "And this deponent also has one-fourth interest as owner of the following goods, &c. viz 15 bales of merchandise," and in his claim and test affidavit, stated that he had agreed with certain persons in the enemy's country to select for them a parcel of goods for the Buenos Ayres market, of which he was to be the consignee, and sell the same on a commission of 10 per cent. The goods were selected and purchased by, and consigned to

him. The bills of lading were in his possession, and he considered his interest under this contract as equal to one-fourth of the value of the goods, "wherefore he did suppose that he was interested in the said goods," &c. "and well entitled as the owner thereof, or otherwise, to an equal fourth part of the said goods, inasmuch as his commissions aforesaid would have been equal to such fourth." Held, that though the claimant had not such an interest in any part of these goods as could be asserted in a Prize Court, and though the language used in the answer to the 12th interrogatory, tended to mislead the Court and to extricate property to which the captors were clearly entitled, although the claimant might think otherwise; yet as this misrepresentation might be ascribed to error of judgment, and was, as soon as possible, corrected by the party, it would not have the effect of involving his other claims in confiscation. *The Nereide*, 9 Cranch, 416, 417.

398. A witness ought never to swear to inferences, without stating the train of reasoning by which his mind has been conducted to them. *Ib.*

399. Prize Courts are necessarily watchful over the testimony of witnesses, and demand the utmost fairness in the conduct of claimants. Yet Prize Courts must distinguish between misrepresentations which may be ascribed to error of judgment, and which are, as soon as possible, corrected by the party who has made them; and wilful falsehoods which are detected by the testimony of others, or confessed by the party when detection becomes inevitable. *Ib.*

400. Trivial and accidental inaccuracies in the testimony of a claimant who is examined as a witness on the standing interrogatories, which are afterwards corrected in his claim and test affidavit, will not work a confiscation of goods of the real neutrality of which no serious doubt is entertained. *Id.* 418.

401. Under the prize act of June 26th, 1812, c. 430, and the act of the 2d of August, 1813, c. 527, allowing a deduction of thirty-three and one third per centum on "all goods captured from the enemy, and made good and lawful prize of war, &c.

and brought into the United States, are not included goods captured and brought in for adjudication, sold by order of Court, and ultimately restored to a neutral claimant as his property; but such goods are chargeable with the same rate of duties as goods imported in foreign bottoms. *The Nereide*, 1 Wheat. 171.

402. If the national character of property, captured and brought in for adjudication, appears ambiguous or neutral, and no claim is interposed, the cause is postponed for a year and a day after the prize proceedings are commenced; and if no claimant appears within that time, the property is condemned to the captors. *The Harrison*, 1 Wheat. 298.

403. In prize causes, this Court has an appellate jurisdiction only, and a claim cannot be originally interposed here; but where the Court below had proceeded to adjudication before the lapse of a year and a day, the cause was remanded to that Court, with directions to allow a claim to be filed therein, and the libel to be amended. *Ib.*

404. It is a general rule in prize causes, that the adjudication should be prompt, and should be made, unless some good reason exist for departing from it, on the papers and testimony afforded by the captured vessel, or on evidence invoked from other vessels in the possession of the Court. *The George*, 1 Wheat. 408, 409.

405. But in cases of joint or collusive capture, the usual simplicity of the prize proceedings is necessarily departed from; and where, in these cases, there is the least doubt, other evidence than that arising from the captured vessel, or invoked from other prize causes, may be resorted to. *Ib.*

406. Where enemy's property is fraudulently blended in the same claim with neutral property, the latter is liable to share in the fate of the former. *The St. Nicholas*, 1 Wheat. 417. 431.

407. A bill of lading, consigning the goods to a neutral, but unaccompanied by an invoice or letter of advice, is not sufficient evidence to entitle the claimant to restitution; but is sufficient to lay a foundation for the introduction of further proof. *The Friendschaft*, 3 Wheat. 14. 48.

408. The fact of invoices, and letters of advice, not being found on board, may induce a suspicion that papers have been spoliated: but even if it were proved, that an enemy master, carrying a cargo chiefly hostile, had thrown papers overboard, a neutral claimant, to whom no fraud is imputable, ought not thereby to be precluded from farther proof. *The Friendschaft*, 3 Wheat. 14. 48.

409. Where a neutral ship owner lends his name to cover a fraud with regard to the cargo, this circumstance will subject the ship to condemnation. *The St. Nicholas*, 1 Wheat. 417. 431. *The Fortuna*, 3 Wheat. 236. 245..

410. It is a relaxation of the rule of the Court to allow time for farther proof in a case where there is a concealment of papers. *The Fortuna*, 3 Wheat. 245.

411. The captors are competent witnesses upon an order for farther proof opened to both parties. *The Anne*, 3 Wheat. 435. 444.

412. The captors are always competent witnesses, as to the circumstances of the capture, such as whether it be joint, collusive, or within neutral territory. *Id.* 444.

413. It is not competent for a neutral consul, without the special authority of his government, to interpose a claim on account of the violation of the territorial jurisdiction of his country. *Id.* 435. 445.

414. Quære, Whether such a claim can be interposed, even by a public minister, without the sanction of the Government, in whose tribunals the cause is pending? *Id.* 446.

415. Irregularities on the part of the captors, originating from mere mistake, or negligence, which work no irreparable mischief, and are consistent with good faith, will not forfeit the rights of prize. *Id.* 448.

416. On an illegal seizure, the original wrong-doers may be made responsible beyond the loss actually sustained, in a case of gross and wanton outrage; but the owners of the privateer, who are only constructively liable, are not bound to the extent of vindictive damages. *The Amiable Nancy*, 3 Wheat. 546. 558.

417. A loss by deterioration of the cargo, not occasioned by the improper conduct of the captors, is not to be included in the estimate of damages on an illegal seizure. *The Amiable Nancy*, 3 Wheat. 559.

418. The probable or possible profits of an unfinished voyage, afford no rule to estimate the damages, in a case of marine trespass. *Id.* 560. *La Amistad de Rues*, 5 Wheat. 385 389.

419. An item for the ransom of a neutral vessel, subsequently seized by another belligerent, for want of papers, of which it had been deprived by the first captor, held not to be a proper item in the estimate of damages on an illegal capture, because the vessel was in no real danger of condemnation by the other belligerent; and the farthest any Prize Court could be presumed to go, in such a case, would be to order farther proof; but the costs and expenses, as far as they were incurred and paid, allowed in the estimate of damages. *The Amiable Nancy*, 3 Wheat. 546. 561.

420. Where it is the fault of the claimant, that defective documents are put on board, the captor's costs and expenses will be ordered to be paid by the claimant on restitution. *The Venus*, 5 Wheat. 127. 131. *The London Packet*, *Id.* 132. 143.

421. Any citizen may seize any property forfeited to the use of the Government, either by the municipal law, or as prize of war, in order to enforce the forfeiture; and it depends upon the Government whether it will act upon the seizure; if it proceeds to enforce the forfeiture by legal process, this is a sufficient confirmation of the seizure. *The Caledonian*, 4 Wheat. 100. 103.

422. Depositions taken on farther proof in one prize cause, cannot be invoked into another. *The Experiment*, 4 Wheat. 84.

423. The evidence to acquit, or condemn, must come, in the first instance, from the papers and crew of the captured ship. *The Dos Hermanos*, 2 Wheat. 76. 79.

424. It is the duty of the captors to bring the ship's papers into the registry of the District Court, and to have the examination of the principal officers and seamen of the captured ship

taken on the standing interrogatories. *The Dos Hermanos*, 2 Wheat. 76. 79.

425. It is exclusively upon these papers and examinations, that the cause is to be heard in the first instance: If, from this evidence, the property clearly appears to be hostile or neutral, condemnation or restitution immediately follows: If the property appears to be doubtful, or the case suspicious, farther proof may be granted, according to the rules which govern the legal discretion of the Court. *Ib.*

426. If the parties have been guilty of gross fraud, or misconduct, or illegality, farther proof is not allowed, and condemnation follows.

427. Although some apology may be found in the state of peace which had so long existed previous to the late war, for the irregularities which had crept into the prize practice, that apology no longer exists; and if such irregularities should hereafter occur, it may be proper to withhold condemnation even in the clearest cases, unless the irregularities are avoided or explained. *Ib.*

428. If a party attempt to impose upon the Court, by knowingly or fraudulently claiming as his own, property belonging in part to others, he will not be entitled to restitution of that portion which he may ultimately establish as his own. *Ib.*

429. The claimants have no right to litigate the question, whether the captors were duly commissioned; the claimants have no *persona standi in judicio* to assert the rights of the United States; but if the capture be made by a non-commissioned captor, the prize will be condemned to the United States. *Ib.*

430. The provision in the Judiciary Act of 1789, c. 20. s. 30. as to taking depositions *de bene esse*, does not apply to cases pending in the Supreme Court, but only to cases in the District Courts. Testimony by depositions can be regularly taken for the Supreme Court only under a commission issuing according to its rules. *The Argo*, 2 Wheat. 287. 289. *The London Packet*, *Id.* 372.

431. In all cases of Admiralty and maritime jurisdiction,

where new evidence is admissible in this Court, the testimony of witnesses must be taken under a commission to be issued from this Court, or from any Circuit Court, under the direction of any judge thereof; and no such commission can issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the other party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories within twenty days from the service of such notice. *Rule of Court, 2 Wheat. vii.*

432. Whenever it is necessary or proper, in the opinion of the presiding judge in any Circuit Court, or District Court exercising Circuit Court jurisdiction, that original papers of any kind should be inspected in the Supreme Court upon appeal, such presiding judge may make such rule or order for the safe keeping, transporting, and return of such original papers, as to him may seem proper, and this Court will receive and consider such original papers in connection with the transcript of the proceedings. *Ib.*

433. If the Court below deny an order for farther proof when it ought to be granted, or allow it when it ought to be denied, and the objection is taken by the party, and appears on the record, the appellate Court can administer the proper relief. *The Pizarro, 2 Wheat. 227. 239.*

434. But, if evidence in the nature of farther proof be introduced, and no formal order or objection appear on the record, it must be presumed to have been done by consent, and the irregularity is waived. *Ib.*

435. Concealment, or spoliation of papers, is not, *per se*, a sufficient ground for condemnation in a Prize Court. It is calculated to excite the vigilance and justify the suspicions of the Court; but is open to explanation; and if the party, in the first instance, fairly, frankly, and satisfactorily explains it, he is deprived of no right to which he is otherwise entitled. If, on the contrary, the spoliation is unexplained, or the explanation is unsatisfactory; if the cause labour under heavy suspicions or gross prevarications; farther proof is denied, and condemnation ensues

from defects in the evidence which the party is not permitted to supply. *The Pizarro*, 2 Wheat. 227. 241. *Livingston & Gilchrist v. Maryland Ins. Co.* 7 Cranch, 508. 544. *Per Story, J.*

436. Under the Spanish treaty of 1795, stipulating that free ships shall make free goods, the want of such a sea-letter or passport, or such certificates as are described in the 17th article, is not a substantive ground of condemnation. It only authorizes capture and bringing in for adjudication, and the proprietary interest in the ship may be proved by other equivalent testimony. But if, upon the original evidence, the cause appears extremely doubtful and suspicious, and farther proof is necessary, the grant or denial of it rests on the same general rules which govern the discretion of Prize Courts in other cases. *The Pizarro*, 2 Wheat. 227. 244.

437. The commander of a squadron is liable to individuals for the trespasses of those under his command, in case of positive or permissive orders, or of actual presence and co-operation. But *quare*, how far he is responsible in other cases? *The Eleonor*, 2 Wheat. 345. 356.

438. Where a capture has actually taken place, with the assent, express or implied, of the commander of a squadron, the prize master may be considered as a bailee to the use of the whole squadron, who are to share in the prize money, and thus the commander may be made responsible ; but not so as to mere trespasses, unattended with a conversion to the use of the squadron. *Ib.*

439. The commander of a single ship is responsible for the acts of those under his command ; as are, likewise, the owners of privateers for the conduct of the commanders appointed by them. *Ib.*

440. The right of visitation and search necessarily carries with it all the means essential to its exercise ; among these may, sometimes, be included the assumption of the disguise of a friend or an enemy, which is a lawful stratagem of war. If, in consequence of the use of this stratagem, the crew of the vessel detained abandon their duty before they are actually made prisoners

of war, and the vessel is thereby lost, the captors are not responsible. *The Eleanor*, 2 Wheat. 345. 356.

441. Whenever an officer seizes a vessel as prize, he is bound to commit her to the care of a competent prize master and crew; not because the original crew, when left on board, (*in the case of the seizure of the vessel of a citizen or neutral,*) are released from their duty without the assent of the master, but from the want of a right to subject the captured crew to the authority of the captor's officer. *Ib.*

442. But this rule does not extend to the case of a mere *detention for examination*, which the commander of the cruising vessel may enforce by orders from his own quarter deck, and may, therefore, send an officer on board the vessel detained, in order more conveniently to enforce it, without taking the vessel out of the possession of her own officers and crew. *Ib.*

443. One of the principal officers of the vessel detained, may be brought on board the belligerent vessel, with the papers, for examination. *Ib.*

## SALE.

- I. Sale of personal property. (A) Warranty of title.  
(B) What concealment or misrepresentation of extrinsic circumstances will vitiate the contract. (C) Rule of damages for breach of the contract in not delivering the article sold. (D) When the property vests.
- II. Sale of real property. (A) Sale of land at auction.  
(B) Failure of consideration. (C) Lien of vendor for unpaid purchase money.

## SALE I.

*Sale of personal property.* (A) *Warranty of title.* (B) *What concealment or misrepresentation of extrinsic circumstances will vitiate the contract.* (C) *Rule of damages for breach of the contract in not delivering the article sold.* (D) *When the property vests.*

(A) *Warranty of title.*

1. It seems, that where the vendor of personal property held it by a bill of sale containing a warranty of title, and assigns that bill of sale to his vendee, on eviction of the latter for defect of title, recourse can be had in equity to the original warrantor of the title. *Riddle v. Mandeville, 5 Cranch, 322. 332.*

(B) *What concealment or misrepresentation of extrinsic circumstances will vitiate the contract.*

2. The vendee is not bound to communicate to the vendor any intelligence, in his possession, relative to extrinsic circumstances, (such, for example, as political events,) which might influence the price of the commodity. *Laidlaw v. Organ, 2 Wheat. 178. 195.*

3. But, at the same time, each party must take care not to do or say any thing tending to impose upon the other; and the question whether any imposition was practised by the vendee upon the vendor, ought to be left by the Court to the jury. *Ib.*

(C) *Rule of damages for breach of the contract in not delivering the article sold.*

4. In an action by the vendee for the breach of a contract of sale by the vendor, in not delivering the article, the measure of damages is the price of the article at the time of the breach of the contract, and not at any subsequent period. *Shepherd v. Hampton*, 3 Wheat. 200. 204.

5. *Quære,* How far this rule applies to a case where advances of money have been made by the purchaser under the contract? *Ib.*

6. It seems, that the rule would not apply to such a case. *Per Marshall, C. J. Ib.*

(D) *When the property vests.*

7. Upon a shipment of goods to be sold, upon joint account of the consignee and shipper, or of the latter alone at the option of the consignee, the right of property does not vest in the consignee until he has made his election under the option given him. *The Venus, 8 Cranch, 253. 275.*

8. To effect a change of property as between vendor and vendee, there must be a contract of sale agreed to by both parties; and if the thing agreed to be sold is to be sent by the vendor to the vendee, it is necessary to the perfection of the contract that it should be delivered to the purchaser or to his agent, which the ship-master to many purposes is considered to be. *Ib.*

9. But a delivery to the master does not vest the property in the consignee, where he has an election, not yet exercised, to take the goods on joint account of himself and the shipper, or of the latter alone. *Ib.*

10. Goods shipped by a British merchant to an American house, (partly in conformity with orders, and partly without orders,) who had an option to accept or reject the whole invoice in a limited time, remain the property of the shippers, until the con-

signees elect to accept them. *The Frances, claim of Dunham & Randolph, 8 Cranch, 354. S. C. 9 Cranch, 183.*

11. Where goods were shipped by British merchants, in pursuance of orders from merchants in this country, partners in trade, and consigned for them to the agent of the shippers in the United States, because in the moment of shipment, information was received that their partnership was dissolved, and the shippers had no instructions in what manner to direct to them; held, that the property vested in the American merchants at the time of shipment. *The Merrimack, claim of M'Kean & Woodland, 8 Cranch, 317. 327.*

12. But if goods be purchased as above, though the accompanying invoices, bills of lading, and letters, be addressed by the foreign consignors to the American merchants for whom the purchase was made, all concurring to show the property to be in them, yet if these documents are enclosed in a letter from the consignors to their agent in the United States, directing him not to deliver the goods in case of the existence of certain circumstances, nor until he should have received payment from the consignees in cash: the property in the goods continues in the consignors *in transitu*. *Id. Claim of Kimmel & Albert.*

13. Goods by the same ship, purchased as above, and consigned to the agent of the shipper in the United States, in whose name also the bill of lading is made out, with a power to keep back the goods in case of the insolvency of the merchants by whom they were ordered, but the bill of parcels and invoice made out in the name of the merchants in this country, for whom the purchase was made, and sent to them; the shipment also being expressed to be on their account, though the goods are spoken of in the letter of the consignors as British property; vested in the American merchants at the time of shipment, nothing being reserved to the shipper but the mere right of stoppage *in transitu*, in case of insolvency, to be exercised by his agent. *Id. Claim of W. & J. Wilkins.*

14. WASHINGTON, TODD, and STORY, J. J., dissented from the last above opinion, upon the ground that the property did

not, by the mere purchase, become vested in the merchants in this country by whose order it was purchased ; that until a delivery, actual or constructive, to them, the property remained in the shipper ; and that even if the goods had actually come to the hands of the agent, his possession would have been but a continuation of the possession of the shipper ; and if the goods had been lost during the voyage, the loss would have been that of the shipper. *The Merrimack, claim of W. & J. Wilkins, 8 Cranch, 317.* 327.

15. Where the property is originally in the shipper in a foreign country, in order to produce a change of property from the shipper to the consignee, it is essentially necessary that the goods should have been sent in consequence of some contract between the parties, by which the one agreed to sell and the other to buy. *The Frances, French's claim, 8 Cranch, 359.*

16. An intention, clearly proved, of a consignor to vest the right of property in the consignee, is not sufficient to effect such a change of property, until the goods are received by the consignee, or some evidence is given of his agreement to take them on his own account ; until that time, the goods are at the risk of the shipper. *Ib.*

17. And it makes no difference, though the consignee were the agent of a third person who had directed him to order the goods, unless it appears that he actually did order them. *Ib.*

18. When goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee ; and it is competent to the consigner, at any time before actual delivery to the consignee, to countermand it. *The Frances, Irvin's claim, 8 Cranch, 418.* 420.

19. Where goods were shipped in England, in pursuance of orders from the consignees in this country, but previous to the execution of the orders, the shippers became embarrassed, and assigned the goods to certain bankers in England, to secure advances made by them, with a request to the consignees to remit the amount to the bankers, and they (the bankers) also repeated

the same request, the invoice being for account and risk of the consignees in this country, but stating the goods to be then the property of the bankers : *Held*, that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them, and was not devested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees to the shippers. *The Mary and Susan, claim of G. & H. Van Wagenen*, 1 Wheat. 25.

20. Where R. G. agreed with the managers of a lottery to take 2,500 tickets, giving approved security on the delivery of the tickets, which were specified in a schedule, and deposited in books of 100 tickets each, thirteen of which books were received and paid for by him, and the remaining twelve were superscribed by him, with his name, in his own handwriting, and endorsed by the agent of the managers, "Purchased; and to be taken by Robert Gray," and on the envelope, covering the whole, "Robert Gray, 12 books :" On the second day's drawing of the lottery, one of the last designated tickets was drawn a prize of 20,000 dollars, and between the third and fourth day's drawing, R. G. tendered sufficient security, and demanded the last 1,200 tickets, and the managers refused to deliver the prize ticket : it was held, that the property in the tickets changed when the selection was made and assented to, and that they remained in the possession of the vendors merely as collateral security, and that the vendee was entitled to recover the amount of the prize. *Thompson v. Gray*, 1 Wheat. 75. 82.

21. The clause respecting security, in the above contract, formed not a condition *precedent*, on which the sale was made to depend, but a condition *subsequent*, the performance of which might be suspended until it should be convenient to the vendee or required by the vendor. *Ib.*

22. An article purchased in general terms from many of the same description, if afterwards selected and set apart with the assent of the parties, as the thing purchased, is as completely identified, and as absolutely sold, as if it had been selected pre-

vious to the sale, and specified in the contract. *Thompson v. Gray*, 1 *Wheat.* 75. 82.

23. Goods were shipped by D. B. & Co, of Liverpool, on board a ship bound to Rio de Janeiro. The invoice was headed, "consigned to Messrs. D. B. & F., by order and on account of J. L." The house of D. B. & Co. of Liverpool, and the house of D. B. & F. of Rio de Janeiro, consisted of the same persons. In a letter from the shippers to the consignees, accompanying the invoice, they say, "For Mr. J. L. we open an account in our books here, and debit him, &c. We cannot yet ascertain the proceeds of his hides, &c.; but we find his order for goods will far exceed the amount of these shipments; therefore, we consign the whole to you, that you may come to a proper understanding with him." It was held, that the goods were, during their transit, the property of the shippers. *The St. Joze Indiano*, 1 *Wheat.* 208. 212.

24. It is competent for an agent abroad, who purchases in pursuance of orders, to vest the property in his principal immediately on the purchase. This is the case when he purchases exclusively on the credit of his principal, or makes an absolute appropriation and designation of the property for his principal. *Ib.*

25. But where a merchant abroad, in pursuance of orders, either sells his own goods, or purchases goods on his own credit, (and thereby becomes the owner,) no property in the goods vests in his correspondent until he has done some notorious act to devest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. *Ib.*

## SALE II.

*Sale of real property.* (A) *Sale of land at auction.* (B) *Failure of consideration.* (C) *Lien of vendor for unpaid purchase money.*

(A) *Sale of land at auction:*

26. Upon a sale of land at auction, if the terms be, that the purchaser shall, within thirty days, give his notes with two good endorsers, and if he shall fail to comply within the thirty days, then the land to be resold on account of the first purchaser, the vendor cannot maintain an action against the vendee for a breach of the contract, until a resale shall have ascertained the deficit, although the vendee should instruct an attorney to draw a deed, and insert his name as purchaser. *Webster & Ford v. Hoban, 7 Cranch, 399.*

(B) *Failure of consideration.*

27. Where a promissory note is given for the purchase of real property, the failure of consideration through defect of title must be *total*, in order to constitute a good defence to an action on the note. *Greenleaf v. Cook, 2 Wheat. 13. 16.*

28. *Quære,* Whether, after receiving a deed, the party can avail himself even of a total failure of consideration? *Ib.*

29. But where a note is given for the purchase money, with full knowledge of the extent of the incumbrance, and the party thus consents to receive the title, its defect is no legal bar to an action on the note. *Ib.*

30. Any *partial* defect in the title, or the deed, is not inquirable into by a Court of law in an action on the note; but the party must seek relief in Chancery. *Ib.*

**(C) Lien of vendor for unpaid purchase money.**

31. The equitable lien of the vendor of real property, for unpaid purchase money, is waived by any act of the parties showing that the lien is not intended to be retained, as by taking separate securities for the purchase money. *Brown v. Gilman*, 4 Wheat. 255. 290.

32. Taking a collateral security for the purchase money, discharges the implied lien on the land. *Ib.*

33. An express contract, that the lien shall be retained to a certain extent, is a waiver of the lien to any greater extent. *Ib.*

*Et vide FRAUDS, (Statute of, 29 Car. II. c. 3.)*

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**SALVAGE.**

1. The right to share in salvage, is forfeited by an embezzlement of part of the property saved. *Mason v. The Blaireau*, 2 Cranch, 240.

2. If a vessel in distress be abandoned at sea by the master and all the crew, excepting one, who is left either by accident or design, he is discharged from his contract as a mariner, and is entitled to claim as a salvor, if he assist in saving the ship and cargo. *Ib.*

3. If apprentices are salvors, their masters are not entitled to their share of the salvage, but it is to be paid to the apprentices for their personal benefit. *Ib.*

4. If a vessel chartered for a voyage, meet a vessel in distress, and one of the charterers being on board, consents that a part of the crew may go on board of the distressed vessel to assist in navigating her into port, this consent does not change the situa-

tion of the parties under the charter party, but the general owner continues to risk his freight, and the consent of the charterer can only be construed to charge him with the hazards to be encountered by the cargo, and not to vary the contract respecting the freight. Consequently, the owner will be entitled to his proportion of the salvage decreed to the saving ship and cargo, in the proportion of the value of the ship and freight to that of the cargo. *Mason v. The Blaireau*, 2 *Cranck*, 240.

5. The claim of salvage is in the nature of a general lien, and any irregular proceeding on the part of the salvors, furnishes motives to diminish their salvage. *Pelisch v. Ware*, 4 *Cranck*, 347.

6. Where a British vessel was captured by a French squadron, and after a part of her cargo was taken out, she was given by the captors to the crew of an American vessel, which had been captured and burnt by the squadron; and the American crew brought the British vessel into a port of the United States in February, 1812, and there libelled her as their own property acquired by donation of the captors, and the United States also claimed the property as forfeited under the non-intercourse act; the Court held, that under the circumstances of the case, no forfeiture was incurred; that the donation was invalid; but that the libellants were entitled to salvage for their services in saving the vessel and cargo; and accordingly decreed a moiety of the nett proceeds to them; and ordered the other moiety to be retained in Court, there to remain until the war (which had intervened with Great Britain) was ended, or the property should be otherwise disposed of under the authority of the government. *The Adventure*, 8 *Cranck*, 221.

7. Salvage is allowed as a reward for meritorious services, and in consideration of a benefit conferred on the person whose property is saved, but never is granted for an illegal act. *The Alerta*, 9 *Cranck*, 359.

8. A British ship was captured by a French squadron, and her crew taken out, and the ship was afterwards abandoned at sea by the captors, after some unsuccessful attempts to burn her.

The ship was found deserted on the high seas by an American ship, and brought into port, and libelled for salvage as a derelict. It was held, 1st. That the District Courts, as Courts of Admiralty, had jurisdiction in cases of salvage, and consequently a power of determining to whom the residue of the property ought to be delivered. 2dly. That immediately on the capture the captors acquired such a right to the property as no neutral nation could justly impugn or destroy ; and that the abandonment of the ship in this case by the captors, did not, under the circumstances, revive or restore the interest of the original British proprietors. 3dly. That the salvage of one third should be allowed to the salvors, and the remaining two thirds, deducting duties and charges, retained and decreed to the French captors, as it had been decreed by the Circuit Court. 4thly. It was doubted whether, on the principles of an abandonment by the French captors, the whole property ought not to have been decreed by the Court below to the salvors ; but as they had not appealed from that decision, no notice could be taken by this Court of their interest in the cause. *McDonough v. Dannery and The Mary Ford*, 3 Dall. 188.

9. Salvage is a compensation for actual service rendered to the property charged with it. It is demandable of right for vessels saved from pirates or from the enemy ; but in order to support the demand, two circumstances must concur : 1st. The taking must be lawful. 2d. There must be a meritorious service rendered to the recaptured. *Talbot v. Seeman*, 1 Cranch, 1.

10. Where the amount of salvage is not regulated by positive law, it must be determined by the general principles of maritime law. *Talbot v. Seeman*, 1 Cranch, 1. *Mason v. The Blaireau*, 2 Cranch, 240.

11. Salvage may be decreed by the Courts of the United States as between aliens, at all events where the jurisdiction is not objected to. *Mason v. The Blaireau*, 2 Cranch, 240.

12. In a case where a vessel was abandoned at sea by all her crew except one, in a perilous situation, and was afterwards brought in to the United States in a disabled state, this Court

decreed a salvage of two fifth parts of the nett value of the ship and cargo to the salvors; and one third of this salvage to the owners of the saving ship and cargo. *Mason v. The Blaireau*, 2 Cranch, 240.

13. In a case of civil salvage, where the amount of the salvage is discretionary, appeals should not be encouraged upon the ground of minute distinctions, nor ought the decision of the Court below, in such a case, to be reversed, unless it manifestly appeared that some important error was committed. *The Sybil*, 4 Wheat. 98.

*Et vide ADMIRALTY I. III.*

PRIZE VIII.

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### SET-OFF.

1. A joint debt cannot, at law, be set off against a separate claim, independent of the statutes of bankruptcy. *Tuckers v. Oxley*, 5 Cranch, 34. 39.

2. But under the bankrupt law of 1800, c. 173. [xix.] s. 42. which is the same with the statute 5 Geo. II. c. 30. a joint debt may be set off against the separate claim of the assignees of one of the partners. *Ib.*

3. As the bankrupt law of the United States, so far as respects this point, is almost, if not entirely, copied from that of England, the decisions which have been made on that law by the English judges may be considered as having been adopted with the text they expounded. *Ib.*

4. If three joint owners of a cargo employ the master of the ship to sell it for them, and he afterwards becomes interested in the share of one of the joint owners, he cannot, in an action

brought against him by the three joint owners to recover the amount of sales, set off his share of that amount. *Young v. Black, 7 Cranch, 565. 567.*

5. By making a promissory note negotiable in a bank, the maker authorizes the bank to advance, on his credit, to the holder of the note, the sum expressed on its face, and after the note has been discounted by the bank, cannot claim a set-off for a demand against the original payee, whether the local law does or does not allow the maker of a note to set-off against the endorsee any just claim which he had against the original payee before notice of the assignment of the note. It would be a fraud on the bank to claim a set-off against the note in consequence of any transactions between the maker and original payee. The right is waived, and cannot, after the note has been discounted, be again set up. *Mandeville v. Union Bank, 9 Cranch, 9.*

## SHIPPING.

- I. Charter-party.
- II. Bottomry bond.
- III. Master and mariners.

## SHIPPING I.

## Charter-party.

1. Where, by a charter-party, A. let to B. for a certain voyage, the whole tonnage of his brig, and covenanted to deliver the cargo at the port of destination, dangers of the seas excepted, and also, that the brig should be tight, strong, and well manned, and provisioned, &c. and the return cargo should be delivered to B. at the home port. And afterwards, by provisional sealed articles, it was among other things agreed between the parties, that the captain should be instructed by his owner to touch at Falmouth; and "there to lay off and on twenty-four hours, or longer, if desired, in day-light, during which time there will come off orders from Mr. F., Mr. T. W., or Messrs. A. & Co." (the consignees;) and the captain was to proceed to such port, as these orders should state, of five specified ports; and if the vessel was detained over twenty-four hours at Falmouth, demurrage should be paid for the time at a stipulated rate; and the vessel proceeded to Falmouth Roads, and there no orders being ready, the vessel, by the orders of Mr. F., came immediately into port, instead of laying off and on for twenty-four hours, and was there seized and detained for eighty days, for a supposed breach of the Revenue Laws of Great Britain. On an action of covenant for demurrage during this period, alleging as a breach, that by the order of Mr. F. the brig was conveyed into the port of Falmouth, and by means thereof was there detained for the eighty

days: It was held by the Court, 1st. That notwithstanding the charter-party and articles, A. remained owner for the voyage, and was answerable for any misconduct of the master, and that the covenant to lay off and on was his covenant as owner. 2dly. That if the going into Falmouth was a breach of the covenant, an action would lie for such breach, not for A. against B. but for B. against A., as the owner, for the wrongful act of his master. 3dly. That, in this case, the master having acted by the orders of B.'s agent in going into Falmouth, no action could be maintained by B. for the breach. 4thly. That no demurrage was due to A. in this case, the detention having been occasioned either by the misconduct of the master, for which A. alone was answerable, or having been done to avoid danger, and not having been occasioned by laying off and on the port of Falmouth to receive orders, or by any misconduct or breach of covenant by B., the true construction of the charter-party charging B. with demurrage only in the latter cases. *Hook v. Groverman*, 1 *Cranch*, 214.

2. Where a vessel is chartered, and meets another vessel in distress in the course of her voyage, and one of the charterers is on board, and consents that a part of the crew may go on board the distressed vessel to assist in saving her, this does not change the situation of the parties under the charter-party, but the owner of the vessel still continues to risk the freight, and the assent of the charterer can only be construed to charge him with hazards to be encountered by the cargo, and not to vary the contract respecting the freight. *Mason v. The Blaireau*, 2 *Cranch*, 240.

## SHIPPING II.

*Bottomry bond.*

3. To make a bottomry, executed by the master, a valid hypothecation, it is necessary to show that the master acted within the scope of his authority, or, in other words, that the advances were made for repairs or supplies necessary for effectuating the objects of the voyage, or the safety and security of the ship; and no presumption should arise in the case, that such repairs or supplies could be procured upon reasonable terms with the credit of the owner, independent of such hypothecation. *The Aurora, 1 Wheat. 96.*

4. If the master have sufficient funds of the owner under his control, or can procure them on the general credit of the owner, to make a necessary repair, he has no authority to subject the ship to an hypothecation. *Ib.*

5. A bottomry bond given to pay off a former bottomry bond, must stand or fall with the first hypothecation; and the subsequent lenders can only claim upon the same ground as the former lenders, of whom they are virtually the assignees. *Ib.*

6. Where money has been advanced, under a stipulation for a bottomry bond, and the vessel is permitted to go to sea without any attempt to enforce the stipulation, it is to be deemed a waiver of the hypothecation, and the party cannot, on a subsequent voyage, insist upon a bottomry bond for his prior advances. *Ib.*

7. A *bona fide* creditor who advances his money to relieve a ship from an actual arrest, on account of debts incurred on the ship's account, may rightfully stipulate for a bottomry interest to secure him for such advances, and the master, if he has no other sufficient funds or credit, may execute a bottomry bond in his favour. *Ib.*

8. But it is very doubtful, if the arresting creditor could en-

title himself to such a bottomry bond by agreeing to withdraw his arrest. *The Aurora*, 1 Wheat. 96.

9. If a person making advances for repairs, &c. has in his own hands funds of the owner, which he may apply to pay for repairs, he cannot entitle himself to a bottomry bond for advances made for such repairs. *Ib.*

10. It is incumbent on the lender on bottomry, to show the items of his claim, and if various demands are mixed up in his bond, some of which would, and some would not, support an hypothecation, it is his duty to separate them, and exhibit them to the Court distinctly, before he can claim a decree for any part of his advances. *Ib.*

### SHIPPING III.

#### *Master and mariner.*

11. A master of a vessel has a right to retain freight received by him, against the owner, or his assignee, as a general creditor. *Hodgson v. Butts*, 3 Cranch, 140.

12. A master of a vessel is bound to save for his owners the ship and cargo confided to his care, by all means in his power, but he is not bound to employ fraud in order to effect the object, even as against an enemy. *Hannay v. Eve*, 3 Cranch, 242.

13. If a slave be a mariner on board a ship, on wages, and desert during the voyage, the master of the ship, if he has acted with good faith, is not responsible to the owner of the slave for his desertion. *Beverley v. Brooke*, 2 Wheat. 100.

14. A mariner forfeits his wages by an embezzlement of any part of the cargo. *Mason v. The Blaireau*, 2 Cranch, 240.

*Et vide ADMIRALTY.*

FACTOR.

FRAUDS II.

GUARANTIE.

**INSURANCE.**

**PRIZE.**

**SALE.**

**SALVAGE.**

**STATUTES OF THE UNITED STATES, III. IV. VI. IX.**

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## STATUTES OF THE UNITED STATES.

- I. *Acts of Congress in general.*
- II. *Bankrupt act.*
- III. *Crimes acts.*
- IV. *Embargo and non-intercourse acts.*
- V. *Judiciary acts.*
- VI. *Neutrality acts.*
- VII. *Patent acts.*
- VIII. *Priority acts.*
- IX. *Revenue and navigation acts.* (A) *Impost acts.* (B) *Excise acts.* (C) *Registry of vessels acts.* (D) *Slave trade acts.* (E) *Land tax acts.*

## STATUTES OF THE UNITED STATES I.

### *Acts of Congress in general.*

1. The Legislature may make the revival of an act depend upon a future event, and direct that event to be made known by proclamation. *The Aurora v. United States, 7 Cranch, 382.*
2. When an act of Congress is revived by a subsequent act, the Legislature must be understood to give it, from the time of revival, precisely that force and effect which it had at the moment when it expired. *Ib.*
3. The act of the 30th of April, 1790, c. 36. [ix.] s. 31. limiting

prosecutions on penal statutes, extends as well to penalties created after, as before that act, and to actions of debt as well as to informations for penalties. *Adams v. Woods*, 2 Cranch, 25.

4. Where a statute creating a forfeiture does not prescribe the mode of demanding it, either debt or information will lie for it. *Ib.*

## STATUTES OF THE UNITED STATES II.

### *Bankrupt acts.*

5. A deed of lands in Maryland, which would have been considered as fraudulent under the bankrupt act of 1800, c. 173. [xix.] s. 1. had it been made after the act went into operation on the 2d of June, but which was signed, sealed, and delivered, on the 30th of May, and acknowledged on the 14th of June, is to be considered as made on the 30th of May; and its acknowledgment on the 14th of June, will not cause it to be considered as within the act. *Wood v. Owings*, 1 Cranch, 239. 250.

6. Under the bankrupt act of 1800, c. 173. [xix.] a joint debt may be set off against the separate claim of the assignee of one of the partners; and a joint debt may be received under a separate commission. *Tucker v. Oxley*, 5 Cranch, 34.

7. By the bankrupt act of 1800, c. 173. [xix.] s. 13. upon the death of an assignee, the right of action for a debt due to the bankrupt, vests in the executor or administrator of the assignee. *Richards v. Maryland Ins. Co.* 8 Cranch, 84. 93.

8. The bankrupt act of 1800, c. 173. [xix.] s. 62: controls, so far as respects the United States, the operation of those clauses in the act which direct the assignees to distribute the funds of the bankrupt equally among all those creditors who prove their debts under the commission; and the United States are not precluded, by proving their debt under the commission, from their right to priority of payment under the acts of March 3d, 1797, c. 368. s. 5. and of March 2d, 1799, c. 128. s. 65. *Harrison v. Sterry*, 5 Cranch, 289. 298.

## STATUTES OF THE UNITED STATES. III.

*Crimes acts.*

9. The 8th section of the crimes act of the 30th of April, 1790, c. 36. [ix.] providing for the trial of crimes committed on the high seas, or in any place out of the jurisdiction of a particular State, does not apply to crimes committed in any territory of the United States, where regular Courts are established to try crimes committed there. *Ex parte Boltman*, 4 Cranch, 75.

10. The word "apprehended" in that section does not imply a civil arrest, in contradistinction to a mere military arrest and seizure. *Ib.*

11. The act of Congress of the 27th of June, 1799, c. 78. punishing frauds on the Bank of the United States, is, in itself, repugnant, and will not support an indictment for uttering as true a forged paper, purporting to be a bank bill of that bank, signed by the President and Cashier. *United States v. Cantril*, 4 Cranch, 167.

12. The crimes act of 1790, c. 36. [ix.] does not reach the crime of murder committed on board a public ship of war of the United States, lying in a harbour of the United States, below low water mark. *United States v. Bevans*, 3 Wheat. 336.

13. A robbery committed on the high seas, is *piracy* within the crimes act of 1790, c. 36. [ix.] although the same robbery committed on land, is not, by the laws of the United States, punished with death. *United States v. Pulmer*, 3 Wheat. 510.

14. Under the crimes act of the 30th of April, 1790, c. 36. [ix.] a manslaughter committed on board of an American merchant ship lying in the river Tigris, in Chiqa, 35 miles above its mouth, off Wampoa, one hundred yards from the sea, and below low water mark, is not punishable, for the 12th section of the

act is confined to manslaughter on the *high seas*. *United States v. Wiltberger*, 5 Wheat. 76.

15. The crimes act of 1790, c. 36. [ix.] s. 8. extends to all persons on board of vessels which throw off their national character by cruising piratically and committing piracy on other vessels. *United States v. Klintonck*, 5 Wheat. 144. *United States v. Furlong*, 5 Wheat. 184.

16. But not to vessels, which were acknowledgedly under the flag and exclusive sovereignty of a foreign State, at the time of committing the piracy. *United States v. Palmer*, 3 Wheat. 610. *United States v. Klintonck*, 5 Wheat. 144.

17. The act of the 3d of March, 1819, c. 76. s. 5. referring the definition of piracy to the law of nations, is constitutional, and sufficiently defines the offence, which is robbery on the seas. *United States v. Smith*, 5 Wheat. 153. *United States v. Pirates*, 5 Wheat. 184.

18. The 8th section of the crimes act of 1790, c. 36. [ix.] respecting piracy, is not repealed by the act of the 3d of March, 1819, c. 76. s. 5. *United States v. Furlong*, 5 Wheat. 184.

19. The words, "out of the jurisdiction of any particular State," in the crimes act of 1790, c. 36. [ix.] s. 8. must be construed to mean, out of the jurisdiction of any particular State of the United States. *United States v. Furlong*, 5 Wheat. 184.

20. The crimes act of the 30th of April, 1790, c. 36. [ix.] extends to piracies committed by vessels having no real national character, but possessed by pirates, whether the offence be committed by a citizen of the United States, or by a foreigner on board of the piratical vessel. *United States v. Holmes*, 5 Wheat. 412.

## STATUTES OF THE UNITED STATES IV.

*Embargo and non-intercourse acts.*

21. It was no offence against the embargo act of the 9th of January, 1808, c. 112. [viii.] to take goods out of one vessel and put them into another, in a port of the United States, if not done with an intent to export them. *The Juliana v. United States*, 6 *Cranch*, 327.

22. To debt for the penalty of an embargo bond, given under the act of the 12th of March, 1808, c. 137. [xxxiii.] s. 3. it is a good plea, that the party was prevented from relanding the goods in the United States by unavoidable accident and superior force. *Durousseau v. United States*, 6 *Cranch*, 307.

23. The 3d section of the embargo act of the 9th of January, 1808, c. 112. [viii.] does not prohibit any vessel from trading with, or putting on board of, any other ship, any goods, &c. generally, but only when such trading or putting on board would be contrary to the embargo acts. Therefore, the mere taking on board a cargo in port, by a registered vessel, from another vessel whose employment was confined to bays, rivers, and sounds of the United States, was not within the prohibition. *The Paulina*, 7 *Cranch*, 52.

24. The 2d section of the embargo act of the 25th of April, 1808, c. 170. [lxvi.] did not prohibit, on pain of forfeiture, any vessel from being laden without the inspection of a revenue officer: the only penalty in such case, was the denial of a clearance. *Ib.*

25. Under the 3d section of the embargo act of the 9th of January, 1808, c. 112. [viii.] a vessel is not forfeited for departing without a clearance, unless she has departed *out of port*; proceeding from a wharf a mile and a half with intent to go to sea, but being yet within the port, is not such a departure as the act intends. *The Active v. United States*, 7 *Cranch*, 100.

26. A vessel which has proceeded to a foreign port contrary to the embargo act of the 9th of January, 1808, c. 112. [viii.] is liable to seizure upon her return, although the act gives a penalty of double the value in case she should not be seized. The offence under that act, of proceeding to a foreign port, is not complete until the arrival of the vessel in a foreign port. *United States v. The Eliza*, 7 Cranch, 113.

27. "Probable cause," within the meaning of the 71st section of the revenue act of 1799, c. 128. means less evidence than would justify condemnation. It imports a seizure made under circumstances which warrant suspicion. *Locke v. United States*, 7 Cranch, 339.

28. The embargo act of the 9th of January, 1808, c. 112. [viii.] s. 1. as to the time of taking the bond required by the act before granting a clearance, is merely directory to the collector. But if the state of facts has existed to which the statute provision is applicable, the authority to require, and the duty to take, the bond, attaches, and a bond may be taken after the clearance and departure of the vessel by the voluntary consent of parties, *nunc pro tunc*, and is good. *Speake v. United States*, 9 Cranch, 28.

29. The obligees in such a bond, voluntarily given, are estopped to deny that the penalty is not double the true value of vessel and cargo. *Ib.*

30. Under the 11th section of the embargo act of the 25th of April, 1808, c. 170. [lxvi.] the collector had a right to remove a vessel detained on suspicion of an intention to violate the embargo laws, from one harbour to another, if necessary for the security of the vessel. *Otis v. Walter*, 9 Cranch, 339.

31. Under the 11th section of the embargo act of the 25th of April, 1808, c. 170. [lxvi.] no right is given to the collector to seize the cargo specifically, or to detain it if separated from the vessel; the authority given respects the vessel only; and the cargo on board remains in the custody of the officer, simply because it is on board of the vessel; but the owner may take it out if he will. *Slocum v. Mayberry*, 2 Wheat. 1.

32. Under the 11th section of the embargo act of 25th of April, 1808, c. 170. [lxvi.] the collector has a right only to detain vessels ostensibly bound to some port of the United States; and a detention after the termination of the voyage is not justifiable; and no farther detention of the cargo is lawful than what is necessarily dependent upon the detention of the vessel; but the question, whether a voyage has terminated, is a question of fact, and if the voyage be *colourably*, but not *really*, terminated, the collector may detain the vessel if he has honest suspicions.

*Otis v. Walter*, 2 *Wheat.* 18.

33. Under the embargo act of the 9th of January, 1808, c. 112. [viii.] a registered or sea letter vessel, which, after having given bonds, sailed to a foreign port, was forfeited as proceeding to a foreign port contrary to the intention of the original embargo act of the 22d of December, 1808, c. 5. *The William King*, 2 *Wheat.* 148.

34. An American vessel captured, condemned, and sold, and purchased by her former owner, who obtained a Danish burgher's brief, and cleared out of a port of the United States as a Dane, is a foreign vessel within the embargo act of the 9th of January, 1808, c. 112. [viii.] s. 5. although really owned by a citizen of the United States. *The Good Catharine v. United States*, 7 *Cranch*, 349.

35. By the 11th section of the embargo act of the 25th of April, 1808, c. 170. [lxvi.] a collector had no right to detain a vessel and cargo *after her arrival at her port of destination*, under a suspicion that she intended to violate the embargo; and such detention could not be justified either by instructions from the Secretary of the Treasury, or the confirmation of the President. *Otis v. Bacon*, 7 *Cranch*, 589.

36. Under the 11th section of the embargo act of the 25th of April, 1808, c. 170. [lxvi.] the collector was justified in detaining a vessel, if in his honest opinion it was the intention to violate any of the provisions of the embargo laws; and it was not necessary for him to show that his suspicions were reasonable, or that there was probable cause of seizure. The

law placed a confidence in his opinion, and when he honestly exercised it, he could not be punished for it. *Crowell v. M'Fadon*, 8 Cranch, 94. *Otis v. Walter*, 9 Cranch, 339. *Otis v. Walter*, 2 Wheat. 18.

37. Notwithstanding the non-intercourse act of the 13th of June, 1798, c. 70: an American vessel driven by distress into a French port, and obliged there to land and sell her cargo, and prevented from taking any thing away in exchange but produce or bills, might purchase and take away such produce without incurring the penalties of that act. *Hallet v. Jenkins*, 3 Cranch, 210.

38. The act of the 9th of February, 1799, c. 108. did not authorize the seizure upon the high seas of any vessel sailing from a French port; and the orders of the President of the United States could not authorize or excuse such a seizure. *Little v. Barreme*, 2 Cranch, 170.

39. The non-intercourse act of the 13th of June, 1798, c. 70. did not intend to affect the sale of vessels of the United States, or to impose any disability on the vessel after a *bona fide* sale and transfer to a foreigner. *Sands v. Knox*, 3 Cranch, 499.

40. The forfeiture of goods inflicted for a violation of the non-intercourse act of the 1st of March, 1809, c. 195. [xci.] takes place on the commission of the offence, and is not avoided by a subsequent *bona fide* sale to an innocent purchaser, although there may have been a regular permit to land the goods, and the duties have been paid thereon. *United States v. 1980 Bags of Coffee*, 8 Cranch, 398. *The Mars*, 8 Cranch, 417.

41. The non-intercourse act of the 1st of March, 1809, c. 195. [xci.] was by force of the act of the 1st of May, 1810, c. 56. and the President's proclamation of the 2d of November, 1810, revived on the 2d day of February, 1811. *The Aurora v. United States*, 7 Cranch, 382.

42. Under the non-intercourse act of 1st of March, 1809, c. 195. [xci.] wines, the produce of France, imported into the United States before the non-intercourse act, and re-exported to a Danish island, and there sold to a merchant of that place, and thence

exported to New-Orleans, during the operation of the non-intercourse act, are liable to forfeiture. *The Hoppel v. United States*, 7 Cranch, 389.

43. The non-intercourse act of the 1st of March, 1809, c. 195. [xci.] which requires a vessel bound to a permitted port to give bond not to go to a prohibited port, applies to vessels in ballast as well as vessels with a cargo on board. *The Richmond v. United States*, 9 Cranch, 102.

44. Under the non-intercourse act of the 1st of March, 1809, c. 195. [xci.] a vessel from Great Britain had a right to lay off and on the coast of the United States to receive instructions from her owner, and if necessary to drop anchor, and in case of a storm to make a harbour; and if prevented by a mutiny of her crew from putting out to sea again, might wait in the waters of the United States for orders. *United States v. The Fanny*, 9 Cranch, 181.

45. Prosecutions under the non-importation act of the 1st of March, 1809, c. 195. [xci.] are causes of Admiralty and Maritime jurisdiction within the meaning of the judiciary act of 1789, c. 20. *The Samuel*, 1 Wheat. 9.

46. Under the non-intercourse act of the 1st of March, 1809, c. 195. [xci.] no vessel having on board prohibited goods, had a right to come into a port or waters of the United States, to inquire whether the act was repealed. *The Brig Penobscot v. United States*, 7 Cranch, 356.

47. Under the 3d section of the act of the 28th of June, 1809, c. 217. [ix.] every vessel bound to a foreign permitted port was obliged to give bond with condition not to proceed to any port with which commercial intercourse was not permitted, nor to trade with such port. *The Edward*, 1 Wheat. 261.

48. Fat cattle are provisions or munitions of war within the meaning of the act of the 6th of July, 1812, c. 452. [cxxxix.] prohibiting the transportation of provisions, &c. to Canada, &c. *United States v. Barber*, 9 Cranch, 243. *United States v. Sheldon*, 2 Wheat. 119.

49. But driving cattle on foot is not a transportation within

the meaning of the same act. *United States v. Sheldon*, 2 Wheat. 119.

## STATUTES OF THE UNITED STATES V.

## Judiciary acts.

50. If the Circuit Court omit to make a statement of facts according to the 19th section of the judiciary act of 1789, c. 20. it is not an error authorizing a reversal. *Hills v. Ross*, 3 Dall. 184. *Jennings v. The Perseverance*, 3 Dall. 336.

51. The prohibition contained in the judiciary act of the 2d of March, 1793, c. 167. [xxii.] s. 5, that writs of injunctions shall not be granted without reasonable notice to the adverse party, or his attorney, extends to injunctions granted by this Court, or the Circuit Court, as well as to those which may be granted by a single judge. *State of New-York v. State of Connecticut*, 4 Dall. 1.

52. By the repeal of the judiciary act of the 13th of February, 1801, c. 229. [lxxv.] s. 33. in 1802, the 19th section of the judiciary act of 1789, c. 20. s. 19. respecting statements of facts in Equity and Admiralty causes, was revived. But this inconvenience was, remedied by the act of the 3d of March, 1803, c. 93. *United States v. Hooe*, 1 Cranch, 318.

53. Under the 10th section of the judiciary act of 1789, c. 20. and notwithstanding the act of the 3d of March, 1803, c. 93. where the District Court of Maine acts as a District Court, as in an Admiralty cause, the appeal from its decisions must be to the Circuit Court of Massachusetts, and not to this Court. *The Sally v. United States*, 5 Cranch, 372.

54. Under the 11th section of the judiciary act of 1789, c. 20. a general assignee of an insolvent debtor cannot sue in the Federal Courts, if the debtor himself could not sue. *Pere v. Pitot*, 6 Cranch, 332.

55. No writ of error lies to this Court from the decree of a Circuit Court, in a civil action, which was carried to

the Circuit Court from the District Court by a *writ of error*, under the 21st section of the judiciary act of 1789, c. 20. *United States v. Goodwin*, 7 *Cranch*, 108. *United States v. Gordon*, 7 *Cranch*, 287. *United States v. Barker*, 2 *Wheat.* 395.

56. Under the 11th and 20th sections of the judiciary act of 1789, c. 20. the Circuit Courts have jurisdiction where the value of the property demanded exceeds 500 dollars; and if upon trial the defendant recovers less, he is not entitled to costs, but may, in the discretion of the Court, be required to pay them. *Green v. Exter*, 8 *Cranch*, 229.

57. Notwithstanding the 12th section of the act of the 27th of February, 1801, c. 86. an appeal lies from the decree of the Circuit Court of the District of Columbia, affirming the sentence of the Orphan's Court of Alexandria, which dismissed a petition to revoke the probate of a will, in virtue of the general right of appeal given by the same act, (sec. 8.) the property which passed under the will exceeding 100 dollars in value. *Carter's heirs v. Cutting*, 8 *Cranch*, 251.

58. The judiciary act of 1789, c. 20. which declares the marshals of the districts responsible for the conduct of their deputies, does not make them responsible for an escape from a State gaol after commitment of a prisoner, by the negligence of the gaoler, for the gaoler is, in no correct sense, the deputy of the marshal. *Randolph v. Donaldson*, 9 *Cranch*, 76.

59. Under the 25th section of the judiciary act of 1789, c. 20. giving a *writ of error* from the decisions of State Courts to this Court, if the validity or construction of a treaty is drawn in question, and the decision is against its validity, or the title specially set up by either party under the treaty, this Court has jurisdiction to ascertain that title, and determine its validity, and is not confined to the abstract construction of the treaty itself. *Martin v. Hunter*, 1 *Wheat.* 304.

60. The judiciary act of 1789, c. 20. s. 30. as to taking depositions *de bene esse*, does not apply to cases pending in this Court, but only to cases in the District and Circuit Courts.

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All depositions in this Court must be under a commission. *The Argo*, 2 Wheat. 287.

61. Under the judiciary act of 1789, c. 20. giving appellate jurisdiction from the State Courts, the writ of error may be directed to any Court in which the record may be found; and if the record has been remitted from the highest Court to another Court, the writ of error may bring it from the latter Court. *Hoyt v. Gelston*, 3 Wheat. 246.

62. Under the judiciary act of 1789, c. 20. s. 25. this Court has no jurisdiction of a cause from a State Court, unless upon a final judgment or decree. *Houston v. Moore*, 3 Wheat. 433.

63. Under the constitution of the United States, and the act of Congress of the 26th of May, 1790, c. 38. [xi.] a judgment of a State Court has the same credit, validity, and effect, in every other Court in the United States, which it has in the State where it is rendered; and whatever pleas to it would be good in such State, and no other can be pleaded in any other Court of the United States. *Mills v. Duryee*, 7 Cranch, 481. *Hampton v. McConnell*, 3 Wheat. 234.

STATUTES OF THE UNITED STATES VI.

*Neutrality acts.*

64. A vessel built in the United States, with the express view of being employed as a privateer in case of an expected war between Great Britain and the United States, was sold to a French citizen, and by him carried to a French island, and there equipped, armed, and commissioned: it was held, that she was not illegally equipped, within the third section of the act of the 5th of June, 1794, c. 226. [L.] *Moodie v. The Ship Alfred*, 3 Dall. 307.

65. By the act of the 19th of February, 1793, c. 153. [viii.] s. 27. officers of the revenue are authorized to make seizures of any ship or goods for breach of any of the laws of the United States. *Hoyt v. Gelston*, 3 Wheat. 246.

66. The statute of neutrality of 1794, c. 226. [L.] s. 3. does not apply to fitting out ships, &c. for the service of any new foreign State, Government, &c., unless it be one which has been recognised as such by the United States, or by the Government of the country to which such new State belonged. *Hoyt v. Gelston*, 2 Wheat. 246.

67. The 7th section of the same act of 1794, does not apply, except to cases where a seizure or detention could not be enforced by the ordinary civil power, and there was a necessity in the opinion of the President to employ naval or military force to enforce the provisions of the law. *Ib.*

68. No part of the act of the 5th of June, 1794, c. 226. [L.] was repealed by the act of the 3d of March, 1817, c. 58.; and the act of 1794 remained in full force until the act of the 20th of April, 1818, c. 83. by which all the former provisions of our laws respecting our neutral relations were embraced, and all former laws on the subject were repealed. *The Estrella*, 4 Wheat. 298.

#### STATUTES OF THE UNITED STATES VII.

##### *Patent acts.*

69. The act of the 21st of January, 1808, c. 117. [xiii.] for the relief of Oliver Evans, does not authorize those who erected his machinery between the expiration of his old patent and the issuing of his new patent, to use it after the issuing of the latter. *Evans v. Jordon*, 4 Cranch, 199.

70. Under the 6th section of the patent law of 1793, c. 158. [xi.] the defendant pleaded the general issue, and gave notice that he would prove at the trial, that the machine, for the use of which, without license, the suit was brought, had been used previous to the alleged invention of the plaintiff, in several places which were specified in the notice, or in some of them, "and also at sundry other places in Pennsylvania, Maryland, and elsewhere in the United States." The defendant having given evidence as to some of the places specified, offered evidence as

to others not specified. *Held*, that this evidence was admissible: But the powers of the Court, in such a case, are sufficient to prevent, and will be exercised to prevent, the patentee from being injured by surprise. *Evans v. Eaton*, 3 Wheat. 454.

71. Testimony, on the part of the plaintiff, that the persons, of whose prior use of the machine the defendant had given evidence, had paid the plaintiff for licenses to use the machine since his patent, ought not to be absolutely rejected, though entitled to very little weight. *Ib.*

72. *Quære*; Whether, under the general patent law, improvements on different machines can be comprehended in the same patent, so as to give a right to the exclusive use of several machines separately, as well as a right to the exclusive use of those machines in combination? *Ib.*

73. However this may be, the act of the 21st of January, 1808, c. 117. [xiii.] "for the relief of Oliver Evans," authorizes the issuing to him of a patent for his invention, discovery, and improvements, in the art of manufacturing flour, and in the several machines applicable to that purpose. *Ib.*

74. *Quære*, Whether Congress can constitutionally decide the fact, that a particular individual is an author or inventor of a certain writing or invention, so as to preclude judicial inquiry into the originality of the authorship or invention? *Ib.*

75. Be this as it may, the act for the relief of Oliver Evans does not decide that fact, but leaves the question of invention and improvement open to investigation under the general patent law. *Ib.*

76. Under the sixth section of the patent law, c. 156 [xi.] if the thing secured by patent had been in use, or had been described in a public work anterior to the supposed discovery, the patent is void, whether the patentee had a knowledge of this previous use or description, or not. *Ib.*

77. Oliver Evans may claim, under his patent, the exclusive use of his inventions and improvement in the art of manufacturing flour and meal, and in the several machines which he has invented, and in his improvement on machines previously disco-

vered. But where his claim is for an improvement on a machine, he must show the extent of his improvement, so that a person understanding the subject may comprehend distinctly in what it consists. *Evans v. Eaton*, 3 Wheat. 454.

78. The act for the relief of O. E. is engrafted on the general patent law, so as to give him a right to sue in the Circuit Court, for an infringement of his patent rights, although the defendant may be a citizen of the same State with himself. *Ib.*

### STATUTES OF THE UNITED STATES VIII.

#### *Priority acts.*

80. The preference given to the United States in cases of insolvency, &c. by the 5th section of the act of the 3d of March, 1797, c. 368. [lxxiv.] is not confined to revenue officers, and persons accountable for public money, but extends to debtors of the United States generally. *Fisher v. Blight*, 2 Cranch, 358.

80. Therefore the United States, as holders of a protested bill of exchange, are entitled to be preferred to the general creditors, where the debtor becomes bankrupt. *Ib.*

81. The priority of the United States, under the act of the 3d of March, 1797, c. 368. [lxxiv.] does not partake of the character of a lien on the property of public debtors. *Fisher v. Blight*, 2 Cranch, 358. *United States v. Hooe*, 3 Cranch, 73.

82. The preference given to the United States, under the act of the 4th of August, 1790, c. 62. [xxxv.] s. 25. explained by the act of the 2d of May, 1792, c. 128. [xxvii.] s. 18. does not extend to cases, where the debtor has not made an assignment of the whole of his property. *United States v. Hooe*, 3 Cranch, 73. *Thellusson v. Smith*, 2 Wheat. 396.

83. If a trivial portion of his estate should be left out for the purpose of evading the act, it would be considered as a fraud upon the law, and void. *United States v. Hooe*, 3 Cranch, 73.

84. The term, "insolvency" used in the act of 1790, c. 62. [xxxv.] s. 45. relates to such a general devestment of property

as would be equivalent to insolvency in its technical sense.  
*United States v. Hooe*, 3 *Cranch*, 73.

85. The priority given to the United States, by the act of the 3d of March, 1797, c. 368. [lxxiv.] s. 5. and by the act of the 2d of March, 1799, c. 128. s. 65. in cases of insolvency, applies not to cases where there is a mere inability of the debtor to pay all his debts, but where there is a known and legal insolvency, manifested by some notorious act of the debtor, pursuant to law.  
*Prince v. Bartlett*, 8 *Cranch*, 431. *Thellusson v. Smith*, 2 *Wheat.* 396.

86. The preference given to the United States in the payment of debts, under the act of 1797, c. 358. [lxxiv.] s. 5. and the act of the 2d of March, 1799, c. 128. s. 65. overreaches the *lien* which a creditor acquires by a judgment on the debtor's land.  
*Thellusson v. Smith*, 2 *Wheat.* 396.

87. The act of the 3d of March, 1797, c. 368. [lxxiv.] s. 5. giving priority to the United States, in certain cases, out of the effects of insolvent debtors, does not apply to a debt due before the passage of the act, although the balance was not adjusted at the treasury until after the act passed. In terms, the act applies to persons "*hereafter becoming indebted to the United States.*" *United States v. Regan*, 9 *Cranch*, 374.

## STATUTES OF THE UNITED STATES IX.

*Revenue and navigation acts.* (A) *Impost acts.* (B) *Excise acts.* (C) *Registry of vessels acts.* (D) *Slave trade acts.* (E) *Land tax acts.*

### (A) *Impost acts.*

88. Under the 41st section of the revenue act of the 4th of August, 1790, c. 62. [xxxv.] a collector may lawfully refuse to allow a credit for duties upon goods imported, where the real owner has a bond in the custom-house due and unpaid, and has collusively transferred the property to a third person, in order to

obtain a credit at the custom-house. *Olney v. Arnold*, 3 *Dall.* 308.

89. No judgment can be sustained on a collector's bond under the 14th section of the act of the 11th of July, 1798, c. 88. unless it appear that the writ has been served fourteen days before the return day of the process. *Dobynes, &c. v. United States*, 3 *Cranck*, 241.

90. The collector of Pittsburgh was not by the act of the 10th of May, 1800, c. 208. [liv.] s. 2. restricted to a commission of  $2\frac{1}{2}$  per cent on the moneys collected by him, and received after the 30th of June, 1800, on account of bonds previously taken for duties arising on goods imported into the United States. *United States v. Hoth*, 3 *Cranck*, 399.

91. Under the duty acts of the 20th of July, 1789, c. 2. and the 10th of August, 1790, c. 66. [xxxix.] and the 2d of May, 1792, c. 128. [xxvii.] round copper plates, and round copper plates turned up at the edges, are not subject to duties on importation. *United States v. Kid*, 4 *Cranck*, 1.

92. A collector of the revenue, under the laws of the United States, has no power to collect outstanding duties after his removal from office; but it devolves on his successor. *Streshley v. United States*, 4 *Cranck*, 169.

93. Wine and spirits saved from a wreck, and landed, are not liable to forfeiture under the revenue act of the 2d of March, 1799, c. 128. because unaccompanied by the marks and certificates required by that act, nor because removed without the consent of the collector before the quantity and quality were ascertained, and the duties paid. *Peisch, v. Ware*, 4 *Cranck*, 347.

94. The regulations of the revenue acts, respect a regular importation, where all the pre-requisites to landing may be performed; not cases where a landing must take place without them, as in cases of salvage or wrecked goods. *Ib.*

95. A forfeiture under our revenue acts, can only be applied to those cases, in which the means that are prescribed for the prevention of the forfeiture may be employed. The means pre-

scribed to save the forfeiture given in the 50th section of the revenue act of the 2d of March, 1799, c. 128. cannot be employed, where a vessel is deserted by her crew, or cannot be brought into port. *Peisch v. Ware*, 4 *Cranch*, 347.

96. The removal of goods, for which the 51st section of the revenue act of the 2d of March, 1799, c. 128. punishes the owner with a forfeiture of the goods, must be made with his consent or connivance, or with that of some person employed or trusted by him. *Ib.*

97. The revenue act of the 2d of March, 1799, c. 128. does not forfeit the property of owners or consignees on account of the misconduct of mere strangers over whom they have no control. *Ib.*

98. Round copper bottoms turned up at the edge, are not liable to duties under the revenue acts, although imported under the name of raised bottoms. *United States v. Potts*, 5 *Cranch*, 284.

99. The trial of seizures under the coasting act of the 18th of February, 1793, c. 153. [viii.] must be in the District where the seizure is made, and not where the offence was committed. *Keene v. United States*, 5 *Cranch*, 304.

100. The 66th section of the revenue act of the 2d of March, 1799, c. 128. punishes the *attempt*, and not the *intention*, to defraud the revenue by false invoices; and, therefore, unless there be an attempt to use a false invoice, no forfeiture is incurred. *United States v. Riddle*, 5 *Cranch*, 311.

101. Under the revenue acts of the United States, duties do not accrue, in the fiscal sense of the term, by a mere arrival in a collection District, not until the vessel arrive at the port of entry. Therefore, if a duty be increased or diminished by law, before arrival at the port of entry, though after the arrival in the collection District, the increased or diminished duty only is to be paid. *United States v. Vowell*, 5 *Cranch*, 368.

102. So, where the duty on salt ceased on the 31st of December, 1807, and a vessel arrived with a cargo of salt within the collection District before that day, but did not arrive at the port

of entry until the 1st of January, 1808, it was held, that the cargo was not liable to pay duties. *United States v. Vowell*, 6 Cranch, 368.

103. The forfeiture provided by the 50th section of the revenue act of the 2d of March, 1799, c. 128. which requires a permit for landing goods, applies to all goods, even those of which the importation is prohibited by law. *Harford v. United States*, 8 Cranch, 109.

104. The double duty imposed by the act of the 1st of July, 1812, c. 435. [cxii.] upon all goods, &c. which should, "from and after the passage of the act," be imported into the United States from any foreign port, took effect on goods imported into the United States on the first day of July. The statute was to take effect from its passage, and it is a general rule, that where a computation is to be made from an act done, the day on which the act is done is to be included. *Arnold v. United States*, 9 Cranch, 104.

105. To constitute an importation, so as to attach a right to duties within the revenue laws of the United States, it is necessary not only that there should be an arrival within the limits of the United States, and of a collection District, but also within the limits of some port of entry. *Ib.*

106. Under the revenue acts, where goods are brought into the United States by superior force, or inevitable accident, they are not deemed imported in the sense of the laws, so as to be liable to pay duties. But if such goods are afterwards sold, or consumed in the country, they become retroactively liable to duties; *aliter*, if they be re-exported. *The Concord*, 9 Cranch, 387.

107. Under the prize act of the 26th of June, 1812, c. 430. [cvii.] and the act of the 2d of August, 1813, c. 577. [xlviii.] allowing a deduction of one third of the duties on prize goods, goods which are captured and brought in for adjudication, sold by order of the Court, and ultimately restored to the claimant, are not included; but such goods are chargeable with the same

rate of duties as goods imported in foreign bottoms. *The Ne-reid*, 1 Wheat. 171.

108. Under the revenue act of the 2d of March, 1799, c. 128. the collector acquires an inchoate right by the seizure, which, by the subsequent decree of condemnation, gives him an absolute vested title to his share in the forfeiture, though he may die, or be removed in the intermediate time. *Van Ness v. Buel*, 4 Wheat. 74.

109. Under the revenue act of the 2d of March, 1799, c. 128. the right to share in the forfeitures and penalties accruing under the act, is given to the collector who made the seizure, or who brought the suit, and not to the collector who was in office at the time of the decree or judgment, or the receipt of the forfeiture, if there has been any intermediate appointment. So of the share of the surveyor of a collection District. *Jones v. Shore's executors*, 1 Wheat. 462. *Van Ness v. Buel*, 4 Wheat. 74.

110. The right of a collector to share in forfeitures, *in rem*, attaches on seizure, and to personal penalties on suit brought, and in each case is consummated by the judgment. *Ib.*

111. By the conquest and military occupation of a portion of the territory of the United States by a public enemy, that portion is to be deemed a foreign country, so far as respects our revenue laws. *The United States v. Rice*, 4 Wheat. 246. 253.

112. Goods imported into it, are not imported into the United States; and are subject to such duties only as the conqueror may impose. *Ib.*

113. The subsequent evacuation of the conquered territory by the enemy, and resumption of authority by the United States, cannot change the character of past transactions. The *jus post-liminii*, does not apply to the case; and the goods previously imported do not become liable to pay duties to the United States, by the resumption of their sovereignty over the conquered territory. *Ib.*

114. The 33d section of the coasting act of the 18th of February, 1793, c. 153. [viii.] does not refer to the cases included

in the 19th section of the same act, so as to control the forfeitures thereby inflicted. *Priestman v. United States*, 4 *Dall.* 28.

115. A vessel licensed for the fisheries, is liable to forfeiture under the 32d section of the coasting act of the 18th of February, 1793, c. 153. [viii.] for sailing, laden with goods with intent to carry them to another place without a license therefor, although the goods are wholly of domestic growth and manufacture, and not liable to duties. But the cargo is not liable to forfeiture, under the 33d section of the same act, unless it belong to the master, owner, or mariner of the vessel. *The Active v. United States*, 7 *Cranch*, 100.

(B) *Excise acts.*

116. The tax laid on carriages, by the act of Congress of the 5th of June, 1794, c. 221. [xlv.] is not a direct tax in the sense of the constitution, requiring an apportionment; and, therefore, may be laid by the rule of uniformity. *Hylton v. United States*, 3 *Dall.* 171.

117. Sugar refined, but not sold and sent out of the manufactory before the 1st of July, 1802, on which day the duties on refined sugars were repealed by the act of the 6th of April, 1802, c. 279. [xix.] were not liable to any duty to the United States, under the act of the 5th of June, 1794, c. 227. [li.] upon being sent out after that day. *Pennington v. Coxe*, 2 *Cranch*, 33.

118. The excise act of the 24th of July, 1813, c. 553. [xxiv.] imposing a duty on stills, &c. did not extend to stills solely employed in the rectification or purification of spirits already distilled. It applied only to stills employed for the purpose of distilling spirits from foreign or domestic materials, not to the rectification of spirits already distilled. *United States v. Ten Broek*, 2 *Wheat.* 248.

(C) *Registry of vessels acts.*

119. Under the ship registry act of the 31st of December, 1792, c. 146. [i.] s. 4. which declares the ship forfeited for any false oath taken to procure a register; or the value thereof; the absolute property of the ship does not vest in the United States, either in fact or in contemplation of law, on the taking of the false oath, but remains in the owner until the United States have manifested an option to take the ship, and not the value. *United States v. Grundy, &c.* 3 Cranch, 337.

120. Under the ship registry act of the 31st of December, 1792, c. 146. [i.] in case of a transfer of a registered ship while at sea, a new register is not necessary to protect the vessel from alien duties when she arrives, or the cargo which was actually imported while the old register was in force. *United States v. Willings,* 4 Cranch, 48.

121. Where a registered vessel, while at sea, is sold by parol, and resold on her return into port before her entry to the original owners, she does not by this operation lose her privileges as an American registered ship, nor become subject to foreign duties; and no new register is necessary under the ship registry act of the 31st of December, 1792, c. 1. *Ib.*

122. Under the 27th section of the ship registry act of 1792, c. 146. [i.] vessels which have not been previously registered, as well as those which have been previously registered, may be forfeited by a fraudulent use of a certificate of registry. *The Neptune,* 3 Wheat. 601.

(D) *Slave-trade acts.*

123. The slave trade act of the 28th of February, 1803, c. 323. [lxiii.] did not apply to the territory of Orleans. *The Brig Amiable Lucy v. United States,* 6 Cranch, 330.

## (E) Land tax acts.

124. Under the land tax act of the 14th of July, 1798, c. 92. before the collector could sell the land of an unknown proprietor for non-payment of the tax, it was necessary that he should advertise the copy of the lists of lands, &c. and the statement of the amount due for the tax, and the notification to pay, for sixty days, in four gazettes of the State, if there were so many printed therein. *Parker v. Rule's lessee*, 9 Cranch, 64.

## USURY.

1. If A. lend money to B.; who puts it out at usurious interest, and agrees to pay to A. the same rate of interest which he is receiving upon A.'s money, this is usury between A. and B.; and an endorser of B.'s note to A. may avail himself of the plea of usury. *Levy v. Gadsby*, 3 Cranch, 180.

2. If the usury be specially pleaded, and the evidence adduced to support the plea, is adjudged by the Court to be inapplicable to the facts so pleaded, it may still be admitted under the general issue. *Ib.*

3. The Court has the exclusive power of construing a written instrument; and of deciding whether the contract contained in it be usurious. *Ib.*

4. If an agent, who has, by direction of his principal, sold eight per cent. stock of the United States, applies the money to his own use, and being pressed for payment, gives a mortgage to secure the repayment of the amount of the stock with eight per cent. interest thereon, it is usury. *De Butts v. Bacon*, 6 Cranch, 252.

## WRIT OF RIGHT.

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## WRIT OF RIGHT.

- I. Against whom a writ of right may be brought, and of the pleadings.
- II. What evidence is necessary, or proper, to maintain a writ of right.
- III. Verdict and judgment.

### WRIT OF RIGHT I.

*Against whom a writ of right may be brought, and of the pleadings.*

1. At common law, a writ of right will not lie, except against the tenant of the freehold demanded. *Green v. Liter*, 8 Cranch, 229.
2. If there are several tenants claiming several parcels of land by distinct titles, they cannot lawfully be joined in one writ; and if they are, they may plead the fact in abatement of the writ. *Ib.*
3. If the demandant demands against any tenant more than he holds, he may plead non-tenure as to the parcel not holden; and this plea, if true, by the ancient common law, would have abated the whole writ. But the statute of 25 Edward III. c. 6. (which may be considered a part of our common law, being in force at the emigration of our ancestors,) cured this defect, and declared that the writ in such case should abate only as to the parcel whereof non-tenure was pleaded, and admitted or proved. *Ib.*
4. In fact, the act of Virginia of 1792, c. 125. which is in force in Kentucky, enacts substantially the same provision as the statute of 25 Edward III. c. 6. *Ib.*
5. At common law, in many instances, if the party demanded more in his writ than he proved to be his right, he lost his ac-

tion by the falsity of his writ. It was to cure this evil that the act of Kentucky was made, enabling a party to recover, although he should prove only part of the claim in his declaration; but it does not enable the plaintiff to join parties in an action who could not be joined at common law, as for instance, a defendant to join and to recover against several tenants claiming by distinct and separate title. *Green v. Liter, 8 Cranch, 229.*

6. At common law, non-tenure, joint tenure, sole tenure, and several tenure, were good pleas in abatement to a writ of right. But they could be pleaded only in abatement, for the tenant by joining the mise, or pleading in bar, admitted himself to be tenant of the freehold. Such pleading in bar was an admission, that he had capacity to defend the suit, and he was estopped to deny it. *Ib.*

7. The act of Virginia of 1786, c. 27., reforming proceedings in writs of right, was not intended to vary the general rights or legal predicament of the parties, nor to take from the tenant the full benefit of the ordinary pleas in abatement. It enabled him to give in evidence any matter under the general issue which would have been good if specially pleaded: but this applies only to matters in bar. *Ib.*

8. If tenants claiming by distinct titles are joined in a writ of right, and omit to plead the matter in abatement, and join the mise, it is an admission that they are joint tenants of the whole; and the verdict, if for the defendant for any parcel of the land, may be general, that he hath more mere right to hold the same than the tenants; and if of any parcel for the tenants, that they have more mere right to hold the same than the defendant. *Green v. Liter, 8 Cranch, 229. Liter v. Green, 2 Wheat. 306.*

9. Assuming that, at common law, a writ of right *patent* may be brought against divers tenants who hold their lands severally, and that the defendant may count against them severally, this doctrine does not apply to writs of right *close*, as our writs of right are; and if the doctrine did apply, and the defendant should in such a case count against all the tenants jointly, and the tenants should plead to the merits, it would, for all the pur-

poses of the suit, be an admission of the joint tenancy. *Green v. Liter*, 2 *Wheat.* 306.

10. The statute of Kentucky, requiring that where several tenements are demanded, the contents, situation, and boundaries of each should be inserted in the count, has not affected this rule; that statute supposes the several tenements are held by the same tenants. *Ib.*

11. In fact the summons on a writ of right *patent* is a several process against each tenant for the land severally held by him, and in this respect is exactly what the original precept is in a writ of right *close*. *Id.* 311. note.

12. A plea in a writ of right, that neither the plaintiff nor his ancestor, nor any other under or from whom he derived his title to the demanded premises, were ever actually seized or possessed of the land, or any part thereof, is bad as amounting to the general issue. *Green v. Liter*, 2 *Wheat.* 306.

13. Under the act of Virginia of 1786, c. 27. the tenant may at his election plead any special matter in bar in writ of right, or give it in evidence on the mise joined. The act is merely cumulative. *Green v. Liter*, 8 *Cranch*, 229.

14. It is no objection to a recovery on a writ of right sued against several tenants who join the mise, that divers of the tenants had no title to certain parcels of the demanded premises, but that they claimed the same under a third person having the legal title thereof; for such proof could not be given in evidence on such an issue, but would be good only on a plea in abatement of non-tenure. *Green v. Liter*, 2 *Wheat.* 306.

15. The allowance of additional pleas besides the mise to be pleaded in a writ of right by the tenant, is a matter of discretion in the Court, and if refused, is not assignable as error. *Ib.*

## WRIT OF RIGHT II.

*What evidence is necessary, or proper, to maintain a writ of right.*

16. Actual seisin, or seisin in deed, is at the common law necessary to maintain a writ of right. Nor is this peculiar to writs of right. It applies also to writs of entry. *Green v. Liter, 8 Cranch, 229.*

17. In ancient times no deed or charter was necessary to convey a fee simple; it was conveyed by mere livery of seisin in the presence of the vicinage. *Ib.*

18. The act of Virginia of 1786, c. 27. has not dispensed with the necessity of proving *actual seisin* in writs of right. *Ib.*

19. Actual seisin, or seisin in deed, may be not only by an entry under title and perception of esplees; but there may also, by construction of law, be an actual seisin in other cases, which shall be sufficient for all purposes of action in legal intendment. *Ib.*

20. Thus an entry is not always necessary to give an actual seisin, or seisin in deed; for if the land be in lease for years, courtesy may be without entry on the land, or even receipt of rent; yet courtesy depends on actual seisin. *Ib.*

21. Taking of esplees is but evidence of seisin, and a seisin in deed once established either by a *pedis positio*, or by construction of law, the taking of the esplees follows as a necessary inference of law. *Ib.*

22. Whenever there exists the union of title and seisin in deed, either by actual entry and livery of seisin, or by intendment of law, as in the cases above put, there the esplees are knit to the title, so as to enable the party to maintain a writ of right. *Ib.*

23. No livery of seisin is necessary to perfect a title to lands by letters patent from the crown. The grantee, in such case, takes by matter of record, and the law deems the grant of record of equal notoriety with an actual tradition or delivery of the land in the presence of the vicinage. *Ib.*

24. Actual seisin passes by operation of law by letters patent of lands from the crown ; for a perfect title is conveyed by such letters patent. Letters patent, under the great seal, of lands, do not convey a mere *seisin in law* to the grantee, (as has been sometimes supposed in argument,) but as was expressly held in *Barwick's case*, 5 Co. 94. do amount to *livery in law*, that is to a livery, which confers a constructive actual seisin of the land ; for what is a livery in law, but such an act as in legal contemplation amounts to a delivery of seisin, of actual seisin ? *Green v. Liter*, 8 Cranch, 229.

25. If a feoffment include divers parcels of land in the same county, livery of seisin of one parcel in the name of the whole is livery of all the parcels which are not in an adverse seisin. This, therefore, as to all the parcels, except that whereof livery was actually made, is but a *livery in law*, and yet to all intents and purposes it is as effectual as a *livery in deed*. *Ib.*

26. The same doctrine applies to seisin in case of a *possessio fratris*. *Ib.*

27. So if a grantee, or heir of several parcels of land in the same county, enter into one parcel in the name of the whole, where there is no conflicting possession, the law adjudges him in *actual seisin* of the whole, though he has not actually entered on the whole. *Ib.*

28. So, if a man have a right of entry into lands, but cannot enter for fear of bodily harm, and he approach as near the land as he dare, and claim the land as his own, he hath presently by the claim a possession and actual seisin of the lands, as well as if he had entered in deed. *Ib.*

29. And *livery*, within the view of the land, will under circumstances give the feoffee an actual seisin, or seisin in deed, as effectually as an actual entry and *livery* on the land. *Ib.*

30. The same is the result of conveyances deriving their effect under the statute of uses ; for there, without an actual entry on livery of seisin on the land, the bargainer has presently as complete seisin in deed by mere operation of law. *Ib.*

31. An actual seisin by construction of law, is just as sufficient

to maintain a writ of right, as an actual seisin by entry in fact on the land. *Green v. Liter*, 8 *Cranch*, 229.

32. Perceptions of profits, or as it is technically called, taking of the esplees, is not absolutely necessary to support a writ of right. The taking of esplees is not a traversable averment in a count. *Ib.*

33. A feoffment is inoperative without a livery of seisin of the lands, but it is otherwise of letters patent from the crown. *Ib.*

34. The conveyance of a freehold by letters patent to commence in *futuro*, is void, as it would be if conveyed by a feoffment; for in neither case can there be a present livery of seisin of the future freehold estate. The livery must operate at the time when made, or not at all. *Ib.*

35. A patent of vacant lands, granted under the land law of Virginia of 1779, conveyed an actual seisin thereof to the grantee, by construction of law, without any actual entry. *Green v. Liter*, 8 *Cranch*, 229. *Barr v. Gratz*, 4 *Wheat.* 213.

36. A conveyance of waste and vacant lands, gives a constructive actual seisin thereof to the grantee without entry, so as to enable him to maintain a writ of right on such seisin. *Green v. Liter*, 8 *Cranch*, 229.

37. In Kentucky a patent is the completion of the legal title of the parties; and it is the *legal title* only that can come in controversy in a writ of right. *Ib.*

38. A better subsisting adverse title in a third person, is no defence in a writ of right. That writ brings into controversy only the mere rights and titles of the parties to the suit. *Ib.*

39. If a man enter into lands, having title, his seisin is not bounded by his actual occupancy, but is held to be co-extensive with his title. *Green v. Liter*, 8 *Cranch*, 229. *Barr v. Gratz*, 4 *Wheat.* 213.

40. But if a man enter into lands without title, his seisin is confined to his possession, by mere metes and bounds. *Ib.*

41. If a man having title to lands in the possession of one tenant, enter into a part, in the name of the whole, he is adjudged-

ed to be in seisin of the whole, notwithstanding an adverse seisin thereof by the tenant. *Green v. Liter*, 8 *Cranch*, 229.

42. But if the lands be in the seisin of several tenants claiming different parcels thereof in severalty, an entry into a parcel held by one tenant, will not give seisin of the parcels held by the other tenants; but there must be an entry into each parcel held by a different tenant. *Ib.*

43. By parity of reason, an entry into a parcel which is vacant, in the name of the whole, will not give seisin of a parcel which is in an adverse seisin. But an entry into the parcel which is in an adverse seisin, in the name of the whole, will ensure as an entry into the vacant parcel also. *Ib.*

44. Where the defendant has the first patent of land, and the tenant afterwards obtains a patent of part of the same land, under which he enters, and obtains the first possession, and the defendant afterwards enters, and takes possession under his first grant, of the land not included in the second grant, the defendant has the better legal title, and his seisin presently, by virtue of his patent, gives him the best mere right to the whole land; and *a fortiori* to that not included in the actual close of the second grantee, for the defendant, by construction of law, has the eldest seisin as well as eldest patent. *Ib.*

45. Where two persons are in possession of land at the same time under different titles, the law adjudges him to have the seisin of the estate who has the better title. Both cannot be seised, and therefore the seisin follows the better title. *Barr v. Gratz*, 4 *Wheat.* 113.

46. Where portions of the same land are claimed under different titles, and each of the parties claims seisin and possession of the whole to the extent of his title, in virtue of an actual seisin of a part, the law adjudges the seisin of the unoccupied part to the party having the better title; and the disseisin of the other party under the inferior title does not extend beyond the limits of his actual occupancy, and his case is the same as if he had made an entry on the land without title. *Ib.*

47. A copy of a survey of the demanded premises is proper evidence to the jury in a writ of right. *Green v. Liter*, 2 Wheat. 306.

## WRIT OF RIGHT III.

*Verdict and judgment.*

48. A verdict against several tenants sued jointly, that the defendant hath more mere right to hold the tenement; as he hath demanded, than the tenants, or either of them, have to hold the respective tenements set forth in their respective pleas, they being parcels of the tenement in the count mentioned, is certain to a common intent, and good, the mise having been joined by the tenants severally as to the several tenements held by them, parcel of the demanded premises, without assuming any thing as to the residue. *Green v. Liter*, 2 Wheat. 306.

49. Upon the mise so joined, the defendant is entitled to recover in the suit, though the tenants give proof that they claim their several tenements under distinct and several titles, for this is matter pleadable in abatement only. *Ib.*

50. Where the tenants are jointly sued, and there is a joint verdict against them in a writ of right on the mise severally joined by them, the judgment should be a joint judgment as well for costs as for the land. *Ib.*

## **A P P E N D I X.**



## A P P E N D I X.

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THE PRINCIPAL ACTS, AND SECTIONS OF ACTS, OF CONGRESS,  
EXPOUNDED OR COMMENTED ON BY THE COURT, WITH RE-  
FERENCE TO THE TITLES OF THE DIGEST WHERE THE EX-  
POSITION OR COMMENTARY IS TO BE FOUND.

### CRIMES ACTS.

*Vide Admiralty IV. p. 13—16. Constitutional Law V. (D) p. 116,  
Statutes of the United States III. p. 400—419.*

#### CHAPTER 36. [ix.]

*An Act for the punishment of certain crimes against the United States.*

Section 1. *Be it enacted, &c.* That if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States, or elsewhere, and shall be thereof convicted, on confession in open Court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death.

Sec. 2. That if any person or persons, having knowledge of the commission of any of the treasons aforesaid, shall conceal, and not as soon as may be, disclose and make known the same to the President of the United States, or some one of the judges thereof, or to the President or Governor of a particular State, or some one of the judges or justices thereof, such person or persons, on conviction, shall be adjudged guilty of misprision of treason, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars.

Sec. 3. That if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of cogn-

try, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death.

Sec. 4. That the Court, before whom any person shall be convicted of the crime of murder, for which he or she shall be sentenced to suffer death, may, at their discretion, add to the judgment, that the body of such offender shall be delivered to a surgeon for dissection; and the marshal who is to cause such sentence to be executed, shall accordingly deliver the body of such offender, after execution done, to such surgeon as the Court shall direct, for the purpose aforesaid: *Provided*, That such surgeon, or some other person by him appointed for the purpose, shall attend to receive and take away the dead body at the time of the execution of such offender.

Sec. 5. That if any person or persons shall, after such execution had, by force, rescue, or attempt to rescue, the body of such offender out of the custody of the marshal or his officers, during the conveyance of such body to any place for dissection as aforesaid; or shall by force rescue, or attempt to rescue, such body from the house of any surgeon, where the same shall have been deposited, in pursuance of this act; every person so offending, shall be liable to a fine not exceeding one hundred dollars, and an imprisonment not exceeding twelve months.

Sec. 6. That if any person or persons, having knowledge of the actual commission of the crime of wilful murder or other felony, upon the high seas, or within any fort, arsenal, dock-yard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States, shall conceal, and not as soon as may be disclose, and make known the same to some one of the judges or other persons in civil or military authority under the United States, on conviction thereof, such person or persons shall be adjudged guilty of misprision of felony, and shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars.

Sec. 7. That if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of manslaughter, and shall be thereof convicted, such person or persons shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars.

Sec. 8. That if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain or mariner, of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the

ship ; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death : and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought.

Sec. 9. That if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under colour of any commission from any foreign prince or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged, and taken to be a pirate, felon, and robber, and on being thereof convicted, shall suffer death.

Sec. 10. That every person who shall, either upon the land or the seas, knowingly and wittingly aid and assist, procure, command, counsel, or advise any person or persons, to do or commit any murder or robbery, or other piracy aforesaid, upon the seas, which shall affect the life of such person, and such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person so as aforesaid aiding, assisting, procuring, commanding, counselling, or advising the same, either upon the land or the sea, shall be, and they are hereby declared, deemed, and adjudged to be accessory to such piracies before the fact, and every such person, being thereof convicted, shall suffer death.

Sec. 11. That after any murder, felony, robbery, or other piracy whatsoever aforesaid, is or shall be committed by any pirate or robber, every person who knowing that such pirate or robber has done or committed any such piracy or robbery, shall on the land or at sea receive, entertain, or conceal any such pirate or robber, or receive or take into his custody any ship, vessel, goods, or chattels, which have been by any such pirate or robber piratically and feloniously taken, shall be, and are hereby declared, deemed, and adjudged to be accessory to such piracy or robbery, after the fact ; and on conviction thereof, shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars.

Sec. 12. That if any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt, or endeavour to corrupt any commander, master, officer, or mariner, to yield up or to run away with any ship or vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to or confederate with pirates, or in any wise trade with any pirate knowing him to be such, or shall furnish such pirate with any ammunition, stores or provisions of any kind, or shall fit out any vessel knowingly, and with a design to trade with, or supply, or correspond with any pirate or robber upon the seas ; or if any person or persons shall any ways consult, combine, confederate or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery ; or if any seaman shall confine the master of any ship or other vessel, or endeavour to make a revolt in such ship ; such person or persons so offending, and being thereof convicted, shall be

imprisoned not exceeding three years, and fined not exceeding one thousand dollars.

Sec. 13. That if any person or persons, within any of the places upon the land under the sole and exclusive jurisdiction of the United States, or upon the high seas, in any vessel belonging to the United States, or to any citizen or citizens thereof, on purpose, and of malice aforethought, shall unlawfully cut off the ear or ears, or cut out or disable the tongue, put out an eye, slit the nose, cut off the nose or a lip, or cut off or disable any limb or member of any person, with intention in so doing to maim or disfigure such person in any the manners before mentioned, then and in every such case the person or persons so offending, their counsellors, aiders, and abettors (knowing of, and privy to, the offence aforesaid) shall, on conviction, be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars.

Sec. 14. That if any person or persons shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly act or assist in the false making, altering, forging, or counterfeiting any certificate, indent, or other public security of the United States, or shall utter, put off, or offer, or cause to be uttered, put off, or offered in payment, or for sale, any such false, forged, altered, or counterfeited certificate, indent, or other public security, with intention to defraud any person, knowing the same to be false, altered, forged, or counterfeited, and shall be thereof convicted, every such person shall suffer death.

Sec. 15. That if any person shall feloniously steal, take away, alter, falsify, or otherwise avoid any record, writ, process, or other proceedings in any of the Courts of the United States, by means whereof any judgment shall be reversed, made void, or not take effect, or if any person shall acknowledge, or procure to be acknowledged in any of the Courts aforesaid, any recognisance, bail or judgment, in the name or names of any other person or persons, not privy or consenting to the same, every such person or persons on conviction thereof, shall be fined not exceeding five thousand dollars, or be imprisoned not exceeding seven years, and whipped not exceeding thirty-nine stripes. *Provided nevertheless,* That this act shall not extend to the acknowledgment of any judgment or judgments by any attorney or attorneys, duly admitted for any person or persons against whom any such judgment or judgments shall be had or given.

Sec. 16. That if any person, within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with an intent to steal or purloin the personal goods of another; or if any person or persons, having at any time hereafter the charge or custody of any arms, ordnance, munition, shot, powder, or habiliments of war belonging to the United States, or of any victuals provided for the victualing of any soldiers, gunners, marines, or pioneers, shall for any lucre or gain, or wittingly, advisedly, and of purpose to hinder or impede the service of the United States, embezzle, purloin, or convey away any of the

said arms, ordnance, munition, shot or powder, habiliments of war, or victuals, that then, and in every of the cases aforesaid, the person or persons so offending, their counsellors, aiders, and abettors (knowing of, and privy to, the offences aforesaid) shall, on conviction, be fined not exceeding the four-fold value of the property so stolen, embezzled, or purloined ; the one moiety to be paid to the owner of the goods, or the United States, as the case may be, and the other moiety to the informer and prosecutor, and be publicly whipped, not exceeding thirty-nine stripes.

Sec. 17. That if any person or persons, within any part of the jurisdiction of the United States as aforesaid, shall receive, or buy any goods or chattels, that shall be feloniously taken or stolen from any other person, knowing the same to be stolen ; or shall receive, harbour or conceal any felons or thieves, knowing them to be so, he or they being of either of the said offences legally convicted, shall be liable to the like punishments as in the case of larceny before are prescribed.

Sec. 18. That if any person shall wilfully and corruptly commit perjury, or shall, by any means, procure any person to commit corrupt and wilful perjury, on his or her oath or affirmation in any suit, controversy, matter or cause depending in any of the Courts of the United States, or in any deposition taken pursuant to the laws of the United States, every person so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding eight hundred dollars ; and shall stand in the pillory for one hour, and be thereaster rendered incapable of giving testimony in any of the courts of the United States, until such time as the judgment so given against the said offender shall be reversed.

Sec. 19. That in every presentment or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court, or before whom the oath or affirmation was taken, (averring such Court, or person or persons, to have a competent authority to administer the same) together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned : without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed.

Sec. 20. That in every presentment or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, and without setting forth the commission or authority of the Court, or person or persons before whom the perjury was committed, or was agreed or promised to be committed.

Sec. 21. That if any person shall, directly or indirectly, give

any sum or sums of money, or any other bribe, present or reward; or any promise, contract, obligation or security, for the payment or delivery of any money, present, or reward, or any other thing to obtain or procure the opinion, judgment or decree of any judge or judges of the United States, in any suit, controversy, matter or cause depending before him or them, and shall be thereof convicted, such person or persons so giving, promising, contracting or securing to be given, paid or delivered, any sum or sums of money, present, reward or other bribe as aforesaid, and the judge or judges who shall in any wise accept or receive the same, on conviction thereof, shall be fined and imprisoned at the discretion of the Court; and shall forever be disqualified to hold any office of honour, trust or profit under the United States.

Sec. 22. That if any person or persons shall knowingly and wilfully obstruct, resist or oppose any officer of the United States, in serving or attempting to serve or execute any mesne process, or warrant, or any rule or order of any of the Courts of the United States, or any other legal or judicial writ or process whatsoever, or shall assault, beat or wound any officer, or other person duly authorized, in serving or executing any writ, rule, order, process, or warrant aforesaid, every person so knowingly and willingly offending in the premises, shall, on conviction thereof, be imprisoned not exceeding twelve months, and fined not exceeding three hundred dollars.

Sec. 23. That if any person or persons, shall by force set at liberty or rescue any person who shall be found guilty of treason, murder, or any other capital crime, or rescue any person convicted of any of the said crimes, going to execution, or during execution; every person so offending, and being thereof convicted, shall suffer death: And if any person shall by force set at liberty, or rescue any person who before conviction shall stand committed for any of the capital offences aforesaid; or if any person or persons shall by force set at liberty, or rescue any person committed for, or convicted of any other offence against the United States, every person so offending, shall, on conviction, be fined not exceeding five hundred dollars, and imprisoned not exceeding one year.

Sec. 24. *Provided always,* That no conviction or judgment for any of the offences aforesaid, shall work corruption of blood, or any forfeiture of estate.

Sec. 25. That if any writ or process shall at any time hereafter be sued forth or prosecuted by any person or persons, in any of the Courts of the United States, or in any of the Courts of a particular State, or by any judge or justice therein respectively, whereby the person of any ambassador or other public minister of any foreign prince or state, authorized and received as such by the President of the United States, or any domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels be distrained, seized or attached, such writ or process shall be deemed and adjudged to be utterly null and void to all intents, construction and purposes whatsoever.

Sec. 26. That in case any person or persons shall sue forth or pro-

secute any such writ or process, such person or persons, and all attorneys or solicitors prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, shall be deemed violators of the laws of nations, and disturbers of the public repose, and imprisoned not exceeding three years, and fined at the discretion of the Court.

Sec. 27. *Provided, nevertheless,* That no citizen or inhabitant of the United States, who shall have contracted debts prior to his entering into the service of any ambassador or other public minister, which debts shall be still due and unpaid, shall have, take, or receive, any benefit of this act; nor shall any person be proceeded against by virtue of this act, for having arrested or sued any other domestic servant of any ambassador or other public minister, unless the name of such servant be first registered in the office of the Secretary of State, and by such Secretary transmitted to the marshal of the District in which Congress shall reside, who shall, upon receipt thereof, affix the same in some public place in his office, whereto all persons may resort and take copies without fee or reward.

Sec. 28. That if any person shall violate any safe-conduct or passport duly obtained and issued under the authority of the United States; or shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the Court.

Sec. 29. That any person who shall be accused and indicted of treason, shall have a copy of the indictment, and a list of the jury and witnesses, to be produced on the trial for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors, delivered unto him at least three entire days before he shall be tried for the same; and in other capital offences, shall have such copy of the indictment and list of the jury two entire days at least before the trial: And that every person so accused and indicted, for any of the crimes aforesaid, shall also be allowed and admitted to make his full defence by counsel learned in the law; and the Court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required immediately upon his request, to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours; and every such person or persons accused or indicted of the crimes aforesaid, shall be allowed and admitted in his said defence to make any proof that he or they can produce, by lawful witness or witnesses, and shall have the like process of the Court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them.

Sec. 30. That if any person or persons be indicted of treason against the United States, and shall stand mute or refuse to plead, or shall challenge peremptorily above the number of thirty-five of the

jury; or if any person or persons be indicted of any other of the offences herein before set forth, for which the punishment is declared to be death, if he or they shall also stand mute, or will not answer to the indictment, or challenge peremptorily above the number of twenty persons of the jury; the Court in any of the cases aforesaid, shall, notwithstanding, proceed to the trial of the person or persons so standing mute or challenging, as if he or they had pleaded not guilty, and render judgment thereon accordingly.

Sec. 31. That the benefit of clergy shall not be used or allowed, upon conviction of any crime, for which, by any statute of the United States, the punishment is, or shall be, declared to be death.

Sec. 32. That no person or persons shall be prosecuted, tried, or punished for treason, or other capital offence aforesaid, wilful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offence aforesaid shall be done or committed; nor shall any person be prosecuted, tried, or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid: *Provided*; That nothing herein contained shall extend to any person or persons fleeing from justice.

Sec. 33. That the manner of inflicting the punishment of death, shall be by hanging the person convicted by the neck until dead.

*Approved, April 30th, 1790.*

## CHAPTER 76.

### *An Act to protect the Commerce of the United States, and punish the crime of Piracy.*

Section 1. Be it enacted, &c. That the President of the United States be, and he hereby is, authorized and requested to employ so many of the public armed vessels, as, in his judgment, the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States, and their crews, from piratical aggressions and depredations.

Sec. 2. That the President of the United States be, and hereby is, authorized to instruct the commanders of the public armed vessels of the United States to subdue, seize, take, and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas.

Sec. 3. That the commander and crew of any merchant vessel or

the United States, owned wholly, or in part, by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel owned as aforesaid, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States; and may subdue and capture the same; and may also retake any vessel, owned as aforesaid, which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States.

Sec. 4. That whenever any vessel or boat, from which any piratical aggression, search, restraint, depredation, or seizure, shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any Court having Admiralty jurisdiction, and which shall be holden for the District into which such captured vessel shall be brought; and the same Court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.

Sec. 5. That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the Circuit Court of the United States for the District into which he or they may be brought, or in which he or they shall be found, be punished with death.

Sec. 6. That this act shall be in force until the end of the next session of Congress.

*Approved, March 3d, 1819.*

### CHAPTER 113.

*An act to continue in force "An act to protect the commerce of the United States and punish the crime of Piracy," and also to make further provision for punishing the crime of Piracy.*

Sec. 1. Be it enacted, &c. That the first, second, third, and fourth sections of an act entitled "An act to protect the commerce of the United States and punish the crime of piracy," passed on the third day of March, one thousand eight hundred and nineteen, be, and the same are hereby continued in force, from the passing of this act for the term of two years, and from thence to the end of the next session of Congress, and no longer.

Sec. 2. That the fifth section of the said act be, and the same is hereby continued in force as to all crimes made punishable by the same, and heretofore committed, in all respects, as fully as if the duration of the said section had been without limitation.

Sec. 3. That if any person shall upon the high seas, or in any

open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate ; and being thereof convicted before the Circuit Court of the United States for the District into which he shall be brought, or in which he shall be found, shall suffer death. And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and on shore, shall commit robbery, such person shall be adjudged a pirate ; and on conviction thereof, before the Circuit Court of the United States for the District into which he shall be brought, or in which he shall be found, shall suffer death : Provided, That nothing in this section contained shall be construed to deprive any particular State of its jurisdiction over such offences, when committed within the body of a county, or authorize the Courts of the United States to try any such offenders, after conviction or acquittance, for the same offence, in a State Court.

Sec. 4. That if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned in the whole or part, or navigated for, or in behalf of any citizen or citizens of the United States, shall land from any such ship or vessel, and on any foreign shore seize any negro or mulatto not held to service or labour by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring or carry, or shall receive, such negro or mulatto on board any such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate ; and on conviction thereof before the Circuit Court of the United States for the District wherein he may be brought or found, shall suffer death.

Sec. 5. That if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned wholly or in part, or navigated for, or in behalf of any citizen or citizens of the United States, shall forcibly confine or detain, or aid and abet in forcibly confining or detaining on board such ship or vessel any negro or mulatto not held to service by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave ; or shall, on board any such ship or vessel, offer or attempt to sell as a slave any negro or mulatto not held to service as aforesaid ; or shall on the high seas, or any where on tide water, transfer or deliver over to any other ship or vessel any negro or mulatto not held to service as aforesaid, with intent to make such negro or mulatto a slave ; or shall land, or deliver on shore, from on board any such ship or vessel, any such negro or mulatto, with intent to make sale of, or having previously sold such negro or mulatto as a slave, such citizen or person shall be adjudged a pirate ; and on conviction thereof before the Circuit

Court of the United States for the District wherein he shall be brought or found, shall suffer death.

*Approved, May 15th, 1820.*

## JUDICIARY ACTS.

*Vide Admiralty I. p. 3—4. Chancery VII. p. 76. Constitutional Law V. p. 102—118. Courts of the United States, p. 127—138. Evidence V. p. 165. Pleading I. p. 283—284. Practice 288—306. Statutes of the United States V. p. 40.*

### CHAPTER 20.

#### *An Act to establish the Judicial Courts of the United States.*

Sec. 1. Be it enacted, &c. That the Supreme Court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum, and shall hold annually at the seat of government two sessions; the one commencing the first Monday of February, and the other the first Monday of August. That the associate justices shall have precedence according to the date of their commissions, or when the commissions of two or more of them bear date on the same day, according to their respective ages.

Sec. 2. That the United States shall be, and they hereby are divided into thirteen districts, to be limited and called as follows, to wit: one to consist of that part of the state of Massachusetts which lies easterly of the state of New-Hampshire, and to be called Maine District; one to consist of the State of New-Hampshire, and to be called New-Hampshire District; one to consist of the remaining part of the State of Massachusetts, and to be called Massachusetts District; one to consist of the State of Connecticut, and to be called Connecticut District; one to consist of the State of New-York, and to be called New-York District; one to consist of the State of New-Jersey, and to be called New-Jersey District; one to consist of the State of Pennsylvania, and to be called Pennsylvania District; one to consist of the State of Delaware, and to be called Delaware District; one to consist of the State of Maryland, and to be called Maryland District; one to consist of the State of Virginia, except that part called the District of Kentucky, and to be called Virginia District; one to consist of the remaining part of the State of Virginia, and to be called Kentucky District; one to consist of the State of South-Carolina, and to be called the South-Carolina District; and one to consist of the State of Georgia, and to be called the Georgia District.

Sec. 3. That there be a Court called a District Court, in each of the aforementioned Districts, to consist of one judge, who shall reside in the District for which he is appointed, and shall be called a District Judge, and shall hold annually four sessions, the first of which to commence as follows, to wit: in the Districts of New-York and of New-Jersey on the first, in the District of Pennsylvania on the second, in the District of Connecticut on the third, and in the District of Delaware on the fourth, Tuesdays of November next; in the Districts of Massachusetts, of Maine, and of Maryland, on the first, in the District of Georgia on the second, and in the Districts of New-Hampshire, of Virginia, and of Kentucky, on the third Tuesdays of December next; and the other three sessions progressively in the respective Districts on the like Tuesdays of every third calendar month afterwards; and in the District of South-Carolina, on the third Monday in March and September, the first Monday in July, and the second Monday of December of each and every year, commencing in December next; and that the District Judge shall have power to hold special Courts at his discretion. That the stated District Court shall be held at the places following, to wit: in the District of Maine, at Portland and Pownalborough, alternately, beginning at the first; in the District of New-Hampshire, at Exeter and Portsmouth alternately, beginning at the first; in the District of Massachusetts, at Boston and Salem alternately, beginning at the first; in the District of Connecticut, alternately at Hartford and New-Haven, beginning at the first; in the District of New-York, at New-York; in the District of New-Jersey, alternately at New-Brunswick and Burlington, beginning at the first; in the District of Pennsylvania, at Philadelphia and Yorktown alternately, beginning at the first; in the District of Delaware, alternately at Newcastle and Dover, beginning at the first; in the District of Maryland, alternately at Baltimore and Easton, beginning at the first; in the District of Virginia, alternately at Richmond and Williamsburgh, beginning at the first; in the District of Kentucky, at Harrodsburgh; in the District of South-Carolina, at Charleston; and in the District of Georgia, alternately at Savannah and Augusta, beginning at the first; and that the special Courts shall be held at the same place in each District as the stated Courts, or in Districts that have two, at either of them, in the discretion of the judge, or in such other place in the District as the nature of the business and his discretion shall direct. And that in the Districts that have but one place for holding the District Court, the records thereof shall be kept at that place; and in Districts that have two, at that place in each District which the judge shall appoint.

Sec. 4. That the before mentioned Districts, except those of Maine and Kentucky, shall be divided into three circuits, and be called the eastern, the middle, and the southern circuit. That the eastern circuit shall consist of the district of New-Hampshire, Massachusetts, Connecticut and New-York; that the middle circuit shall consist of the Districts of New-Jersey, Pennsylvania, Delaware, Maryland and Virginia; and that the southern circuit shall consist of the Districts of South-Carolina and Georgia; and that there shall

be held annually; in each District of said circuits, two Courts which shall be called Circuit Courts, and shall consist of any two justices of the Supreme Court, and the District Judge of such Districts, any two of whom shall constitute a quorum: Provided, That no District Judge shall give a vote in any case of appeal or error from his own decision; but may assign the reasons of such his decision.

Sec. 5. That the first session of the said Circuit Court in the several Districts shall commence at the times following, to wit: in New-Jersey on the second, in New-York on the fourth, in Pennsylvania on the eleventh, in Connecticut on the twenty-second, and in Delaware on the twenty-seventh days of April next; in Massachusetts on the third, in Maryland on the seventh, in South-Carolina on the twelfth, in New-Hampshire on the twentieth, in Virginia on the twenty-second, and in Georgia on the twenty-eighth days of May next; and the subsequent sessions in the respective Districts on the like days of every sixth calendar month afterwards, except in South-Carolina, where the session of the said Court shall commence on the first, and in Georgia where it shall commence on the seventeenth day of October, and except when any of those days shall happen on a Sunday, and then the session shall commence on the next day following. And the sessions of the said Circuit Court shall be held in the District of New-Hampshire, at Portsmouth and Exeter alternately, beginning at the first; in the District of Massachusetts, at Boston; in the District of Connecticut, alternately at Hartford and New-Haven, beginning at the last; in the District of New-York, alternately at New-York and Albany, beginning at the first; in the District of New-Jersey, at Trenton; in the District of Pennsylvania, alternately at Philadelphia and Yorktown, beginning at the first; in the District of Delaware, alternately at Newcastle and Dover, beginning at the first; in the District of Maryland, alternately at Annapolis and Easton, beginning at the first; in the District of Virginia, alternately at Charlottesville and Williamsburgh, beginning at the first; in the District of South-Carolina, alternately at Columbia and Charleston, beginning at the first; and in the District of Georgia, alternately at Savannah and Augusta, beginning at the first. And the Circuit Courts shall have power to hold special sessions for the trial of criminal causes at any other time at their discretion, or at the discretion of the Supreme Court.

Sec. 6. That the Supreme Court may, by any one or more of its justices being present, be adjourned from day to day until a quorum be convened; and that a Circuit Court may also be adjourned from day to day by any one of its judges, or if none are present, by the marshal of the District, until a quorum be convened; and that a District Court, in case of the inability of the judge to attend at the commencement of a session, may, by virtue of a written order from the said judge, directed to the marshal of the District, be adjourned by the said marshal to such day, antecedent to the next stated session of the said Court, as in the said order shall be appointed; and in case of the death of the said judge, and his vacancy not being supplied, all process, pleadings, and proceedings of what nature soever, pending before the said Court, shall be continued of course until the

next stated session after the appointment and acceptance of the office by his successor.

Sec. 7. That the Supreme Court, and the District Courts, shall have power to appoint clerks for their respective Courts, and that the clerk for each District Court shall be clerk also of the Circuit Court in such District, and each of the said clerks shall, before he enters upon the execution of his office, take the following oath or affirmation, to wit : " I, A. B., being appointed clerk of do solemnly swear or affirm, that I will truly and faithfully enter and record all the orders, decrees, judgments, and proceedings of the said Court, and that I will faithfully and impartially discharge and perform all the duties of my said office, according to the best of my abilities and understanding. So help me God." Which words, so help me God, shall be omitted in all cases where an affirmation is admitted instead of an oath. - And the said clerks shall also severally give bond, with sufficient sureties, (to be approved of by the Supreme and District Courts respectively,) to the United States, in the sum of two thousand dollars, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the Court of which he is clerk.

Sec. 8. That the justices of the Supreme Court, and the District judges, before they proceed to execute the duties of their respective offices, shall take the following oath or affirmation, to wit : " I, A. B., do solemnly swear, or affirm, that I will administer justice without respect to persons, and do equal right to the poor and the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God."

Sec. 9. That the District Courts shall have, exclusively of the Courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective Districts, or upon the high seas ; where no other punishment than whipping not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted ; and shall also have exclusive original cognizance of all civil causes of Admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective Districts, as well as upon the high seas ; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it : And shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. And shall also have cognizance, concurrent with the Courts of the several States, or the Circuit Courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations, or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts,

exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the Courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the District Courts, in all causes except civil causes of Admiralty and maritime jurisdiction, shall be by jury.

Sec. 10. That the District Court in Kentucky District shall, besides the jurisdiction aforesaid, have jurisdiction of all other causes, except of appeals and writs of error, herein after made cognizable in a Circuit Court, and shall proceed therein in the same manner as a Circuit Court, and writs of error and appeals shall lie from decisions therein to the Supreme Court in the same causes, as from a Circuit Court to the Supreme Court, and under the same regulations. And the District Court in Maine District, shall, besides the jurisdiction herein before granted, have jurisdiction of all causes, except of appeals and writs of error herein after made cognizable in a Circuit Court, and shall proceed therein in the same manner as a Circuit Court: And writs of error shall lie from decisions therein to the Circuit Court in the District of Massachusetts in the same manner as from other District Courts to their respective Circuit Courts.

Sec. 11. That the Circuit Courts shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the District Courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a Circuit or District Court; And no civil suit shall be brought before either of the said Courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ; nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such Court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. And the Circuit Courts shall also have appellate jurisdiction from the District Courts, under the regulations and restrictions hereinafter provided.

Sec. 12. That if a suit be commenced in any State Court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the Court; and the defendant shall,

at the time of entering his appearance in such State Court, file a petition for the removal of the cause for trial into the next Circuit Court, to be held in the District where the suit is pending, or if in the District of Maine, to the District Court next to be holden therein, or if in Kentucky District, to the District Court next to be holden therein, and offer good and sufficient surety for his entering in such Court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the State Court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged ; and the said copies being entered as aforesaid, in such Court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process. And any attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment in the same manner as by the laws of such State they would have been holden to answer final judgment, had it been rendered by the Court in which the suit commenced. And if in any action commenced in a State Court, the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the Court, either party, before the trial, shall state to the Court, and make affidavit if they require it, that he claims, and shall rely upon, a right or title to the land, under a grant from a State, other than that in which the suit is pending, and produce the original grant or an exemplification of it, except where the loss of public records shall put it out of his power, and shall move that the adverse party inform the Court, whether he claims a right or title to the land under a grant from the State in which the suit is pending ; the said adverse party shall give such information, or otherwise not to be allowed to plead such grant, or give it in evidence upon the trial, and if he informs that he does claim under such grant, the party claiming under the grant first mentioned, may then, on motion, remove the cause for trial to the next Circuit Court to be holden in such district, or if in the District of Maine, to the Court next to be holden therein ; or if in Kentucky District, to the District Court next to be holden therein ; but if he is the defendant, shall do it under the same regulations as in the before-mentioned case of the removal of a cause into such Court by an alien : And either party removing the cause, shall be allowed to plead or give evidence of any other title than that by him stated as aforesaid, as the ground of his claim. And the trial of issues in fact in the Circuits Courts shall, in all suits, except those of Equity, and of Admiralty and maritime jurisdiction, be by jury.

Sec. 13. That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens ; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have

exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics, or domestic servants, as a Court of law can have or exercise consistently with the law of nations ; and original, but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul, or vice-consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the Circuit Courts, and Courts of the several States, in the cases hereinabove specially provided for : And shall have power to issue writs of prohibition to the District Courts, when proceeding as Courts of Admiralty and Maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principle and usages of law, to any Courts appointed, or persons holding office, under the authority of the United States.

Sec. 14. That all the before-mentioned Courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some Court of the same, or are necessary to be brought into Court to testify.

Sec. 15. That all the said Courts of the United States shall have power, in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in Chancery ; and if a plaintiff shall fail to comply with such order, to produce books or writings, it shall be lawful for the Courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit ; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the Courts respectively, on motion as aforesaid, to give judgment against him or her by default.

Sec. 16. That suits in Equity shall not be sustained in either of the Courts of the United States, in any case where plain, adequate, and complete remedy may be had at law.

Sec. 17. That all the said Courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the Courts of law ; and shall have power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said Courts, all contempts of authority in any cause or hearing before the same ; and to make and establish

all necessary rules for the orderly conducting business in the said Courts, provided such rules are not repugnant to the laws of the United States.

Sec. 18. That when, in a Circuit Court, judgment upon a verdict in a civil action shall be entered, execution may, on motion of either party, at the discretion of the Court, and on such conditions for the security of the adverse party as they may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said Court, a petition for a new trial. And if such petition be there filed within said term of forty-two days, with a certificate thereon from either of the judges of such Court, that he allows the same to be filed, which certificate he may make or refuse at his discretion, execution shall of course be further stayed to the next session of said Court. And if a new trial be granted, the former judgment shall be thereby rendered void.

Sec. 19. That it shall be the duty of the Circuit Courts, in causes in Equity and of Admiralty and Maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record, either from the pleadings and decree itself, or a state of the case agreed by the parties, or their counsel, or if they disagree, by a stating of the case by the Court.

Sec. 20. That where, in a Circuit Court, a plaintiff in an action, originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, or a libellant, upon his own appeal, less than the sum or value of three hundred dollars, he shall not be allowed, but at the discretion of the Court, may be adjudged to pay costs.

Sec. 21. That from final decrees in a District Court, in causes of Admiralty and Maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next Circuit Court, to be held in such District. *Provided, nevertheless,* That all such appeals from final decrees as aforesaid, from the District Court of Maine, shall be made to the Circuit Court, next to be holden after each appeal in the District of Massachusetts.

Sec. 22. That final decrees and judgments in civil actions in a District Court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a Circuit Court, holden in the same District, upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated transcript of the record, and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such District Court, or a justice of the Supreme Court, the adverse party having at least twenty days notice. And upon a like process, may final judgments and decrees in civil actions, and suits in Equity in a Circuit Court, brought there by original process, or removed there from Courts of the several States, or removed there by appeal from a District Court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed, or affirmed in the Supreme Court, the citation being

in such case signed by a judge of such Circuit Court, or justice of the Supreme Court, and the adverse party having at least thirty days notice. But there shall be no reversal in either Court on such writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the Court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of; or in case the person entitled to such writ of error be an infant, *feme covert, non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability. And every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good.

Sec. 23. That a writ of error as aforesaid shall be a supersedeas and stay execution in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment, or passing the decree complained of. Until the expiration of which term of ten days, executions shall not issue in any case where a writ of error may be a supersedeas; and where upon such writ of error the Supreme or a Circuit Court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion.

Sec. 24. That when a judgment or decree shall be reversed in a Circuit Court, such Court shall proceed to render such judgment, or pass such decree as the District Court should have rendered or passed; and the Supreme Court shall do the same on reversals therein, except where the reversal is in favour of the plaintiff, or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision. And the Supreme Court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the Circuit Court to award execution thereupon.

Sec. 25. That a final judgment or decree in any suit, in the highest Court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, may be re-examined, and reversed or affirmed in the Su-

preme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the Court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Circuit Court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

Sec. 26. That in all causes brought before either of the Courts of the United States to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance shall appear, by the default or confession of the defendant, or upon demurrer, the Court before whom the action is, shall render judgment therein for the plaintiff, to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury.

Sec. 27. That a marshal shall be appointed in and for each District for the term of four years, but shall be removable from office at pleasure, whose duty it shall be to attend the District and Circuit Courts when sitting therein, and also the Supreme Court in the District in which that Court shall sit, and to execute throughout the District, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint, as there shall be occasion, one or more deputies, who shall be removable from office by the judge of the District Court, or the Circuit Court sitting within the District, at the pleasure of either; and before he enters on the duties of his office, he shall become bound for the faithful performance of the same, by himself and by his deputies before the judge of the District Court to the United States, jointly and severally, with two good and sufficient sureties, inhabitants and freeholders of such District, to be approved by the District Judge, in the sum of twenty thousand dollars, and shall take before said judge, as shall also his deputies, before they enter on the duties of their appointment, the following oath of office: "I, A. B., do solemnly swear or affirm, that I will faithfully execute all lawful precepts directed to the marshal of the District of \_\_\_\_\_ under the authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal (or marshal's deputy, as the case may be) of the District of \_\_\_\_\_ during my continuance in said office, and take only my lawful fees. So help me God."

Sec. 28. That in all causes wherein the marshal or his deputy shall be a party, the writs and precepts therein shall be directed to such disinterested person as the court, or any justice or judge thereof may appoint, and the person so appointed is hereby authorized to execute and return the same. And in case of the death of any marshal, his deputy or deputies, shall continue in office, unless otherwise specially removed, and shall execute the same in the name of the deceased, until another marshal shall be appointed and sworn: And the defaults or misfeasances in office of such deputy or deputies, in the mean time, as well as before, shall be adjudged a breach of the condition of the bond given, as before directed, by the marshal who appointed them; and the executor or administrator of the deceased marshal shall have like remedy for the defaults and misfeasances in office of such deputy or deputies during such interval, as they would be entitled to if the marshal had continued in life and in the exercise of his said office, until his successor was appointed, and sworn or affirmed: And every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power notwithstanding to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office; and the marshal shall be held answerable for the delivery to his successor of all prisoners which may be in his custody at the time of his removal, or when the term for which he is appointed shall expire, and for that purpose may retain such prisoners in his custody until his successor shall be appointed and qualified as the law directs.

Sec. 29. That in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence. And jurors in all cases to serve in the Courts of the United States, shall be designated by lot or otherwise in each State respectively according to the mode of forming juries therein now practised, so far as the laws of the same shall render such designation practicable by the Courts or Marshals of the United States; and the jurors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens, to serve in the highest Courts of law of such State, and shall be returned as there shall be occasion for them, from such parts of the District, from time to time, as the Court shall direct, so as shall be most favourable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the District with such services. And writs of *venire facias*, when directed by the Court, shall issue from the clerk's office, and shall be served and returned by the marshal in his proper person or by his deputy, or in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as the Court shall specially appoint for that purpose, to whom they shall administer an oath or affirmation that he will truly and impartially serve and return such writ. And when, from challenges or otherwise, there shall not be a jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of

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the Court where such defect of jurors shall happen, return jury-men *de talibus circumstantibus* sufficient to complete the pannel; and when the marshal or his deputy are disqualified as aforesaid, jurors may be returned by such disinterested person as the Court shall appoint.

Sec. 30. That the mode of proof by oral testimony and examination of witnesses in open Court shall be the same in all the Courts of the United States, as well in the trial of causes in Equity, and of Admiralty and Maritime jurisdiction, as of actions at common law. And when the testimony of any person shall be necessary in any civil cause depending in any District in any Court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such District, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may be taken *de bene esse* before any justice or judge of any of the Courts of the United States, or before any chancellor, justice, or judge of a Supreme or Superior Court, mayor or chief magistrate of a city, or judge of a County Court or Court of Common Pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause, provided that a notification from the magistrate before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest, if either is within one hundred miles of the place of such capture, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And in causes of Admiralty and Maritime jurisdiction, or other cases of seizure when a libel shall be filed in which an adverse party is not named, and depositions of persons circumstanced as aforesaid, shall be taken before a claim be put in, the like notification, as aforesaid, shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate, until he deliver the same with his own hand into the Court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any, given to the adverse party by him, the said magistrate, sealed up and directed to such Court, and remain under his seal until opened in Court. And any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in Court. And in the trial of any cause of Admiralty or Maritime jurisdiction in a District Court, the decree in

which may be appealed from, if either party shall suggest to, and satisfy the Court, that probably it will not be in his power to produce the witnesses there testifying before the Circuit Court, should an appeal be had; and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the Court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the Court which shall try the appeal, that the witnesses are then dead or gone out of the United States, or to a greater distance than as aforesaid from the place where the Court is sitting, or that by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at Court, but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause. *Provided,* That nothing herein shall be construed to prevent any Court of the United States from granting a *deditus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice, which power they shall severally possess ; nor to extend to depositions taken in *perpetuam rei memoriam*, which if they relate to matters that may be cognizable in any Court of the United States, a Circuit Court, on application thereto made, as a Court of Equity may, according to the usages in Chancery, direct to be taken.

Sec. 31. That where any suit shall be depending in any Court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment, and the defendant or defendants are hereby obliged to answer thereto accordingly ; and the Court before whom such cause may be depending, is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the Court where such suit is depending, twenty days beforehand, shall neglect or refuse to become a party to the suit, the Court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party to the suit : And the executor or administrator who shall become a party as aforesaid, shall, upon motion to the Court where the suit is depending, be entitled to a continuance of the same until the next term of the said Court. And if there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated ; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants.

Sec. 32. That no summons, writ, declaration, return, process,

judgment, or other proceedings in civil causes in any of the Courts of the United States, shall be abated, arrested, quashed, or reversed, for any defect or want of form, but the said Courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form in such writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatsoever, except those only in cases of demurrer, which the party demurring shall specially set down and express, together with his demurrer as the cause thereof. And the said Courts respectively shall, and may, by virtue of this act, from time to time, amend all and every such imperfections, defects, and wants of form, other than those only which the party demurring shall express as aforesaid; and may, at any time, permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said Courts respectively shall in their discretion, and by their rules, prescribe.

Sec. 33. That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such State; and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such Court of the United States, as by this act has cognizance of the offence: And copies of the process shall be returned as speedily as may be into the clerk's office of such Court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offender, or the witnesses, shall be in a District other than that in which the offence is to be tried, it shall be the duty of the judge of that District where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same District to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the District in which the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the Supreme or a Circuit Court, or by a justice of the Supreme Court, or a judge of a District Court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law. And if a person committed by a justice of the Supreme, or a judge of a District Court, for an offence not punishable with death, shall afterwards procure bail, and there be no judge of the United States, in the District to take the same, it may be taken by any judge of the Supreme, or Superior Court of law of such State.

Sec. 34. That the laws of the several States, except where the constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials

at common law in the Courts of the United States, in cases where they apply.

Sec. 35. That in all the Courts of the United States, the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as by the rules of the said Courts respectively shall be permitted to manage and conduct causes therein. And there shall be appointed in each District, a meet person learned in the law to act as attorney for the United States in such District, who shall be sworn, or affirmed, to the faithful execution of his office, whose duty it shall be to prosecute in such District all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the Supreme Court in the District in which that Court shall be holden. And he shall receive as a compensation for his services such fees as shall be taxed therefor in the respective Courts before which the suits or prosecutions shall be. And there shall also be appointed a meet person learned in the law, to act as Attorney General for the United States, who shall be sworn, or affirmed, to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.

*Approved, September 24th, 1789.*

### CHAPTER 38. [xi.]

*An Act to prescribe the mode in which the public Acts, Records, and Judicial Proceedings, in each State, shall be authenticated, so as to take effect in every other State.*

Sec. 1. Be it enacted, &c. That the acts of the legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto: That the records and judicial proceedings of the Courts of any State shall be proved or admitted in any other Court within the United States, by the attestation of the clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every Court within the United States, as they have by law or usage in the Courts of the State from whence the said records are, or shall be taken.

*Approved, May 26, 1790.*

## CHAPTER 167. [xxii.]

*An Act in addition to the act, entitled, "An Act to establish the Judicial Courts of the United States."*

Sec. 1. *Be it enacted, &c.* That the attendance of only one of the justices of the Supreme Court, at the several Circuit Courts of the United States, to be hereafter held, shall be sufficient, any law requiring the attendance of two of the said justices notwithstanding: *Provided,* That it shall be lawful for the Supreme Court, in cases where special circumstances shall, in their judgment, render the same necessary, to assign two of the said justices to attend the Circuit Court or Courts; and it shall be the duty of the justices, so assigned, to attend accordingly. *And provided also,* That when only one judge of the Supreme Court shall attend any Circuit Court, and the district judge shall be absent, or shall have been of counsel, or be concerned in interest, in any cause then pending, such Circuit Court may consist of the said judge of the Supreme Court alone.

Sec. 2. That if at any time only one judge of the Supreme Court, and the judge of the District, shall sit in a Circuit Court, and upon a final hearing of a cause, or of a plea to the jurisdiction of the Court, they shall be divided in opinion, it shall be continued to the succeeding Court; and if, upon the second hearing, when a different judge of the Supreme Court shall be present, a like division shall take place, the District Judge adhering to his former opinion, judgment shall be rendered in conformity to the opinion of the presiding judge.

Sec. 3. That the Supreme Court, or when the Supreme Court shall not be sitting, any one of the justices thereof, together with the Judge of the District within which a special session, as hereafter authorized, shall be holden, may direct special sessions of the Circuit Courts to be holden for the trial of criminal causes, at any convenient place within the District, nearer to the place where the offences may be said to be committed, than the place or places appointed by law for the ordinary sessions: That the clerk of such Circuit Court shall, at least thirty days before the commencement of such special session, cause the time and place for holding the same to be notified, for at least three weeks, successively, in one or more of the newspapers published nearest to the place where the session is to be holden: That all process, writs, and recognisances, of every kind, whether respecting juries, witnesses, bail, or otherwise, which relate to the cases to be tried at the said special sessions, shall be considered as belonging to such sessions, in the same manner as if they had been issued or taken in reference thereto: That any special session may be adjourned to any time or times previous to the next stated meeting of the Circuit Court: That all business depending for trial at any special Court, shall, at the close thereof, be considered as of course removed to the next stated term of the Circuit Court: And that the District Courts of Maine and Kentucky shall have like power to hold special sessions for the trial of criminal

causes, as hath been heretofore given, or is hereby given, to the Circuit Courts, subject to the like regulations and restrictions.

Sec. 4. That bail, for appearance in any Court of the United States, in any criminal cause in which bail is by law allowed, may be taken by any judge of the United States, any chancellor, judge of a Supreme, or Superior Court, or chief or first judge of a Court of Common Pleas, of any State, or mayor of a city, in either of them, and by any person having authority from a Circuit Court, or the District Courts of Maine or Kentucky, to take bail; which authority, revocable at the discretion of such Court, any Circuit Court, or either of the District Courts of Maine or Kentucky, may give to one or more discreet persons, learned in the law, in any district for which such Court is holden, where, from the extent of the district, and remoteness of its parts from the usual residence of any of the beforenamed officers, such provision shall, in the opinion of the Court be necessary. *Provided*, That nothing herein shall be construed to extend to taking bail in any case where the punishment for the offence may be death; nor to abridge any power heretofore given by the laws of the United States, to any description of persons to take bail.

Sec. 5. That writs of ne exeat, and of injunction, may be granted by any judge of the Supreme Court, in cases where they might be granted by the Supreme or a Circuit Court; but no writ of ne exeat shall be granted unless a suit in equity be commenced, and satisfactory proof shall be made to the Court or judge granting the same, that the defendant designs quickly to depart from the United States; nor shall a writ of injunction be granted to stay proceedings in any Court of a State; nor shall such writ be granted in any case, without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same.

Sec. 6. That subpoenas for witnesses, who may be required to attend a Court of the United States, in any district thereof, may run into any other district: *Provided*, That in civil causes, the witnesses living out of the district in which the Court is holden, do not live at a greater distance than one hundred miles from the place of holding the same.

Sec. 7. That it shall be lawful for the several Courts of the United States, from time to time, as occasion may require, to make rules and orders, for their respective Courts, directing the returning of writs and processes, the filing of declarations, and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation; and otherwise, in a manner not repugnant to the laws of the United States, to regulate the practice of the said Courts, respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings.

Sec. 8. That where it is now required by the laws of any State, that goods taken in execution, on a writ of fieri facias, shall be appraised previous to the sale thereof, it shall be lawful for the appraisers appointed under the authority of the State, to appraise goods taken in execution, on a fieri facias issued out of any Court of the United States, in the same manner as if such writ had issued out

of a Court held under the authority of the State ; and it shall be the duty of the marshal, in whose custody such goods may be, to summon the appraisers, in like manner as the sheriff is, by the laws of the State, required to summon them : and the appraisers shall be entitled to the like fees, as in cases of appraisements under the laws of the State ; and if the appraisers, being duly summoned, shall fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement.

*Approved, March 2, 1793.*

### CHAPTER 353. [xciii.]

*An Act in addition to an act, entitled "An act to amend the Judicial system of the United States."*

Sec. 1. Be it enacted, &c. That the Circuit Court of the second Circuit shall consist of the justice of the Supreme Court residing within the third Circuit, and the District Judge of the District where such court shall be holden.

In the third Circuit, the said Circuit Court shall consist of the senior associate justice of the Supreme Court residing within the fifth Circuit, and the District Judge of the District where such Court shall be holden.

Sec. 2. That from all final judgments or decrees in any of the District Courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the Circuit Court next to be holden in the District where such final judgment or judgments, decree or decrees, may be rendered ; and the Circuit Court or Courts are hereby authorised and required to receive, hear, and determine such appeal ; and that from all final judgment or decrees rendered or to be rendered in any Circuit Court, or in any District Court acting as a Circuit Court, in any cases of equity, admiralty, and maritime jurisdiction, and of prize or no prize, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars, shall be allowed to the Supreme Court of the United States, and that upon such appeal, a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause, shall be transmitted to the said Supreme Court ; and that no new evidence shall be received in the said Court on the hearing of such appeal, except in admiralty and prize causes, and that such appeals shall be subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error ; and that the said Supreme Court shall be, and hereby is, authorized and required to receive, hear and determine such appeals. And that so much of the nineteenth and twenty-second sections of the act of Congress, entitled "An act to establish the Judicial Courts of the United States," passed on the twenty-fourth day of September, seventeen hundred and eighty-nine, as comes within the purview of this act, shall be, and the same is hereby repealed.

*Approved, March 3, 1803.*

## NEUTRALITY ACTS.

Vide Prize I. p. 314—318. Statutes of the United States VI. p. 409, 410.

## CHAPTER 226. [L.]

An Act in addition to the "Act for the punishment of certain crimes against the United States."

Sec. 1. Be it enacted, &c. That if any citizen of the United States shall, within the territory or jurisdiction of the same, accept and exercise a commission to serve a foreign prince, or state, in war, by land or sea, the person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than two thousand dollars, and shall be imprisoned not exceeding three years.

Sec. 2. That if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire, or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign Prince or State as a soldier, or as a marine, or seaman, on board of any vessel of war, letter of marque, or privateer, every person so offending, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years. *Provided*, That this shall not be construed to extend to any subject or citizen of a foreign prince or state, who shall transiently be within the United States, and shall, on board of any vessel of war, letter of marque, or privateer, which, at the time of its arrival within the United States, was fitted and equipped as such, enlist or enter himself, or hire, or retain another subject or citizen of the same foreign prince or state, who is transiently within the United States, to enlist or enter himself to serve such prince or state on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such prince or state. *And provided further*, That if any person so enlisted shall, within thirty days after such enlistment, voluntarily discover, upon oath, to some justice of the peace, or other civil magistrate, the person or persons by whom he was so enlisted, so as that he or they may be apprehended and convicted of the said offence, such person, so discovering the offender or offenders, shall be indemnified from the penalty prescribed by this act.

Sec. 3. That if any person shall, within any of the ports, harbours, bays, rivers, or other waters of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall, knowingly, be concerned in the furnishing, fitting out, or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens, or property of another foreign prince or state with whom the United States are

at peace, or shall issue or deliver a commission, within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every such person, so offending, shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned at the discretion of the Court in which the conviction shall be had, so as the fine to be imposed shall, in no case, be more than five thousand dollars, and the term of imprisonment shall not exceed three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited, one half to the use of any person who shall give information of the offence, and the other half to the use of the United States.

Sec. 4. That if any person shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, cruiser, or armed vessel, in the service of a foreign prince or state, or belonging to the subjects or citizens of such prince or state, the same being at war with another foreign prince or state with whom the United States are at peace, by adding to the number or size of the guns of such vessel prepared for use, or by the addition thereto of any equipment solely applicable to war, every such person, so offending, shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the Court in which the conviction shall be had, so as that such fine shall not exceed one thousand dollars, nor the term of imprisonment be more than one year.

Sec. 5. That if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, with whom the United States are at peace, every such person, so offending, shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall suffer fine and imprisonment, at the discretion of the Court in which the conviction shall be had, so as that such fine shall not exceed three thousand dollars, nor the term of imprisonment be more than three years.

Sec. 6. That the District Courts shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the ~~coasts~~ or shores thereof.

Sec. 7. That in every case in which a vessel shall be fitted out and armed, or attempted to be fitted out or armed, or in which the force of any vessel of war, cruiser, or other armed vessel, shall be increased or augmented, or in which any military expedition or enterprise shall be begun or set on foot, contrary to the prohibitions and provisions of this act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States, as above defined, and in every case in

which any process issuing out of any Court of the United States, shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruizer, or other armed vessel, of any foreign prince or state, or of the subjects or citizens of such prince or state, in every such case it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land, or naval forces of the United States, or of the militia thereof, as shall be judged necessary, for the purpose of taking possession of, and detaining, any such ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of this act, and to the restoring such prize or prizes, in the cases in which restoration shall have been adjudged, and, also, for the purpose of preventing the carrying on of any such expedition or enterprize, from the territories of the United States, against the territories or dominions of a foreign prince or state with whom the United States are at peace.

Sec. 8. That it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be necessary to compel any foreign ship or vessel to depart the United States, in all cases in which, by the laws of nations, or the treaties of the United States, they ought not to remain within the United States.

Sec. 9. That nothing in the foregoing act shall be construed to prevent the prosecution or punishment of treason, or any piracy, defined by a treaty, or other law of the United States.

Sec. 10. That this act shall continue, and be in force, for, and during the term of two years, and from thence to the end of the next session of Congress, and no longer.

*Approved, June 5, 1794.*

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## CHAPTER 1. [i.]

### *An act to prevent citizens of the United States from privateering against nations in amity with, or against citizens of, the United States.*

Sec. 1. Be it enacted, &c. That if any citizen or citizens of the United States shall, without the limits of the same, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly aid, or be concerned in the furnishing, fitting out, or arming, any private ship or vessel of war, with intent that such ship or vessel shall be employed to cruise or commit hostilities upon the subjects, citizens, or property, of any prince or state with whom the United States are at peace, or upon the citizens of the United States or their property, or shall take the command of, or enter on board of, any such ship or vessel, for the intent aforesaid, or shall purchase an interest in any vessel so fitted out and armed, with a view to share in the profits thereof, such person or persons, so offending, shall, on conviction thereof, be adjudged guilty of a

high misdemeanor, and shall be punished by a fine not exceeding ten thousand dollars, and imprisonment not exceeding ten years: and the trial for such offence, if committed without the limits of the United States, shall be in the district where the offender shall be apprehended, or first brought.

Sec. 2. That nothing in the foregoing act shall be construed to prevent the prosecution or punishment of treason, or any piracy defined by a treaty, or other law of the United States.

*Approved, June 14, 1797.*

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## CHAPTER 58.

### *An act more effectually to preserve the neutral relations of the United States.*

Sect. 1. Be it enacted, &c. That if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming, of any such ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities, or to aid or co-operate in any warlike measure whatever, against the subjects, citizens, or property, of any prince or state, or of any colony, district, or people, with whom the United States are at peace, every such person so offending shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than ten thousand dollars, and the term of imprisonment shall not exceed ten years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited, one half to the use of any person who shall give information, and the other half to the use of the United States.

Sec. 2. That the owners of all armed ships, sailing out of the ports of the United States, and owned wholly, or in part, by citizens thereof, shall enter into bond to the United States, with sufficient sureties, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by such owners in cruising or committing hostilities, or in aiding, or co-operating, in any warlike measure against the subjects, citizens, or property, of any prince or state, or of any colony, district, or people, with whom the United States are at peace.

Sec. 3. That the collectors of the customs be, and they are hereby, respectively, authorized and required, to detain any vessel manifestly built for warlike purposes, and about to depart from the

United States, of which the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board, or other circumstances, shall render it probable that such vessel is intended to be employed by the owner, or owners, to cruise or commit hostilities upon the subjects, citizens, or property, of any prince, or state, or of any colony, district, or people, with whom the United States are at peace, until the decision of the President be had thereupon, or until the owner enters into bond, and sureties, to the United States, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by the owner, or owners, in cruising or committing hostilities, or in aiding, or co-operating, in any warlike measure against the subjects, citizens, or property, of any prince or state, or of any colony, district, or people, with whom the United States are at peace.

Sec. 4. That if any person shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing, or augmenting, the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, cruiser, or armed vessel, in the service of a foreign prince, or state, or of any colony, district, or people, or belonging to the subjects, or citizens, of any such prince, state, colony, district, or people, the same being at war with any foreign prince, or state, with whom the United States are at peace, by adding to the number or size of the guns of such vessels prepared for use, or by the addition thereto of any equipment solely applicable to war, every such person, so offending, shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the court, in which the conviction shall be had, so as that such fines shall not exceed one thousand dollars, nor the term of imprisonment be more than one year.

Sec. 5. That this act shall continue in force for the term of two years.

Approved, March 3, 1817.

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## CHAPTER 83.

*An act in addition to the "Act for the Punishment of certain Crimes against the United States," and to repeal the acts therein mentioned.*

Sec. 1. Be it enacted, &c. That if any citizen of the United States shall, within the territory or jurisdiction thereof, accept and exercise a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace, the person so offending shall be deemed guilty of a high misdemean-

or, and shall be fined not more than two thousand dollars, and shall be imprisoned not exceeding three years.

Sec. 2. That if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States, with intent to be enlisted, or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, every person, so offending, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years: *Provided*, That this act shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people, who shall transiently be within the United States, and shall, on board of any vessel of war, letter of marque, or privateer, which, at the time of its arrival within the United States, was fitted and equipped as such, enlist or enter himself, or hire or retain another subject or citizen of the same foreign prince, state, colony, district, or people, who is transiently within the United States, to enlist, or enter himself to serve such foreign prince, state, colony, district, or people, on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people.

Sec. 3. That if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming, of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruize or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, or shall issue, or deliver a commission within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited, one half to the use of the informer, and the other half to the use of the United States.

Sec. 4. That if any citizen or citizens of the United States shall, without the limits thereof, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly aid, or be concerned in the furnishing, fitting out, or arming, any private ship, or vessel of war, or privateer, with intent that such ship or vessel shall be employed to cruize, or commit hostilities upon the citizens of the United States, or their property, or shall take the command of, or enter on board of, any such ship or vessel, for the intent aforesaid, or shall purchase any interest in any such ship or

vessel, with a view to share in the profits thereof, such persons so offending, shall be deemed guilty of a high misdemeanor, and fined not more than ten thousand dollars, and imprisoned not more than ten years; and the trial for such offence, if committed without the limits of the United States, shall be in the District in which the offender shall be apprehended, or first brought.

Sec. 5. That if any person shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, or shall knowingly be concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by the addition thereto of any equipment solely applicable to war, every person, so offending, shall be deemed guilty of a high misdemeanor, shall be fined not more than one thousand dollars, and be imprisoned not more than one year.

Sec. 6. That if any person shall, within the territory or jurisdiction of the United States, begin, or set on foot, or provide, or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people with whom the United States are [at] peace, every person, so offending, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years.

Sec. 7. That the District Courts shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.

Sec. 8. That in every case in which a vessel shall be fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel, shall be increased or augmented, or in which any military expedition or enterprise shall be begun, or set on foot, contrary to the provisions and prohibitions of this act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States as before defined, and in every case in which any process issuing out of any Court of the United States, shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel, of any foreign prince or state, or of any colony, district, or people, or of any subjects, or citizens of any foreign prince or state, or of any colony, district, or people, in every such case it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking

possession of, and detaining any such ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of this act, and to the restoring the prize or prizes in the cases in which restoration shall have been adjudged, and, also, for the purpose of preventing the carrying on of any such expedition or enterprise from the territories or jurisdiction of the United States, against the territories or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace.

Sec. 9. That it shall be lawful for the President of the United States, or such person as he shall empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be necessary to compel any foreign ship or vessel to depart the United States, in all cases in which, by the laws of nations, or the treaties of the United States, they ought not to remain within the United States.

Sec. 10. That the owners, or consignees of every armed ship or vessel sailing out of the ports of the United States, belonging wholly, or in part, to citizens thereof, shall enter into bond to the United States, with sufficient sureties, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by such owners, to cruise, or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace.

Sec. 11. That the collectors of the customs be, and they are hereby, respectively, authorized and required to detain any vessel manifestly built for warlike purposes, and about to depart the United States, of which the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board, or other circumstances, shall render it probable that such vessel is intended to be employed by the owner or owners, to cruise, or commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, until the decision of the President be had thereon, or until the owner or owners shall give such bond and security as is required of the owners of armed ships by the preceding section of this act.

Sec. 12. That the act passed on the fifth day of June, one thousand seven hundred and ninety-four, entitled "An act in addition to the act for the punishment of certain crimes against the United States," continued in force, for a limited time, by the act of the second of March, one thousand seven hundred and ninety-seven, and perpetuated by the act passed on the twenty-fourth of April, one thousand eight hundred, and the act passed on the fourteenth day of June, one thousand seven hundred and ninety-seven, entitled "An act to prevent citizens of the United States from privateering against nations in amity with, or against the citizens of the United States," and the act, passed the third day of March, one thousand eight hundred and seventeen, entitled "An act more effectually to preserve

the neutral relations of the United States," be, and the same are hereby, severally, repealed: *Provided, nevertheless,* That persons having heretofore offended against any of the acts aforesaid, may be prosecuted, convicted, and punished, as if the same were not repealed; and no forfeiture heretofore incurred by a violation of any of the acts aforesaid, shall be affected by such repeal.

Sec. 13. That nothing in the foregoing act shall be construed to prevent the prosecution or punishment of treason, or any piracy defined by the laws of the United States.

*Approved, April 20th, 1818.*

## PATENT ACTS.

*Vide Statutes of the United States, VII. p. 410—412.*

### CHAPTER 156. [xi.]

*An act to promote the progress of useful arts; and to repeal the act heretofore made for that purpose.*

Sec. 1. Be it enacted, &c. That when any person or persons, being a citizen or citizens of the United States, shall allege that he or they have invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used before the application, and shall present a petition to the Secretary of State, signifying a desire of obtaining an exclusive property in the same, and praying that a patent may be granted therefor, it shall and may be lawful for the said Secretary of State to cause letters patent to be made out, in the name of the United States, bearing teste by the President of the United States, reciting the allegations and suggestions of the said petition, and giving a short description of the said invention or discovery, and thereupon granting to such petitioner, or petitioners, his, her, or their, heirs, administrators, or assigns, for a term not exceeding fourteen years, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention or discovery; which letters patent shall be delivered to the Attorney General of the United States, to be examined; who, within fifteen days after such delivery, if he finds the same conformable to this act, shall certify accordingly, at the foot thereof, and return the same to the Secretary of State, who shall present the letters patent, thus certified, to be signed, and shall cause the seal of the United States to be thereto affixed: and the same shall be good and available to the grantee or grantees, by force of this act, and shall be recorded

in a book, to be kept for that purpose, in the office of the Secretary of State, and delivered to the patentee, or his order.

Sec. 2. *Provided always,* That any person who shall have discovered an improvement in the principle of any machine, or in the process of any composition of matter, which shall have been patented, and shall have obtained a patent for such improvement, he shall not be at liberty to make, use, or vend, the original discovery, nor shall the first inventor be at liberty to use the improvement. And it is hereby enacted and declared, that simply changing the form or the proportions of any machine, or composition of matter, in any degree, shall not be deemed a discovery.

Sec. 3. That every inventor, before he can receive a patent, shall swear or affirm, that he does verily believe that he is the true inventor or discoverer of the art, machine, or improvement, for which he solicits a patent; which oath or affirmation may be made before any person authorized to administer oaths; and shall deliver a written description of his invention, and of the manner of using, or process of compounding, the same, in such full, clear, and exact terms, as to distinguish the same from all other things before known, and to enable any person, skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound, and use, the same. And in the case of any machine, he shall fully explain the principle, and the several modes in which he has contemplated the application of that principle or character by which it may be distinguished from other inventions; and he shall accompany the whole with drawings and written references, where the nature of the case admits of drawings, or with specimens of the ingredients, and of the composition of matter, sufficient in quantity for the purpose of experiment, where the invention is of a composition of matter; which description, signed by himself, and attested by two witnesses, shall be filed in the office of the Secretary of State; and certified copies thereof shall be competent evidence in all Courts where any matter or thing, touching such patent right, shall come in question. And such inventor shall, moreover, deliver a model of his machine, provided the Secretary shall deem such model to be necessary.

Sec. 4. That it shall be lawful for any inventor, his executor, or administrator, to assign the title and interest in the said invention, at any time; and the assignee, having recorded the said assignment in the office of the Secretary of State, shall thereafter stand in the place of the original inventor, both as to right and responsibility; and so the assignees of assigns, to any degree.

Sec. 5. That if any person shall make, devise, and use, or sell, the thing so invented, the exclusive right of which shall, as aforesaid, have been secured to any person by patent, without the consent of the patentee, his executors, administrators, or assigns, first obtained in writing, every person, so offending, shall forfeit and pay to the patentee, a sum that shall be at least equal to three times the price for which the patentee has usually sold or licensed to other persons the use of the said invention; which may be recovered in an action on the case, founded on this act, in the Circuit Court of

the United States, or any other Court having competent jurisdiction.

Sec. 6. That the defendant in such action shall be permitted to plead the general issue, and give this act, and any special matter, of which notice in writing may have been given, to the plaintiff or his attorney, thirty days before trial, in evidence, tending to prove that the specification filed by the plaintiff does not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the described effect, which concealment or addition shall fully appear to have been made for the purpose of deceiving the public, or that the thing, thus secured by patent, was not originally discovered by the patentee, but had been in use, or had been described, in some public work, anterior to the supposed discovery of the patentee, or that he had surreptitiously obtained a patent for the discovery of another person: in either of which cases, judgment shall be rendered for the defendant, with costs, and the patent shall be declared void.

Sec. 7. That where any State, before its adoption of the present form of government, shall have granted an exclusive right to any invention, the party claiming that right shall not be capable of obtaining an exclusive right under this act but on relinquishing his right under such particular State; and of such relinquishment, his obtaining an exclusive right under this act shall be sufficient evidence.

Sec. 8. That the persons whose applications for patents were, at the time of passing this act, depending before the Secretary of State, Secretary of War, and Attorney General, according to the act, passed the second session of the first congress, entitled "An act to promote the progress of useful arts," on complying with the conditions of this act, and paying the fees herein required, may pursue their respective claims to a patent under the same.

Sec. 9. That in case of interfering applications, the same shall be submitted to the arbitration of three persons, one of whom shall be chosen by each of the applicants, and the third person shall be appointed by the Secretary of State; and the decision or award of such arbitrators, delivered to the Secretary of State, in writing, and subscribed by them, or any two of them, shall be final, as far as respects the granting of the patent; And if either of the applicants shall refuse or fail to choose an arbitrator, the patent shall issue to the opposite party. And where there shall be more than two interfering applications, and the parties applying shall not all unite in appointing three arbitrators, it shall be in the power of the Secretary of State to appoint three arbitrators for the purpose.

Sec. 10. That upon oath or affirmation being made before the judge of the District Court, where the patentee, his executors, administrators, or assigns, reside, that any patent, which shall be issued in pursuance of this act, was obtained surreptitiously, or upon false suggestion, and motion made to the said Court, within three years after issuing the said patent, but not afterwards, it shall and may be lawful for the judge of the said District Court, if the matter alleged shall appear to him to be sufficient, to grant a rule, that the patentee, or his executor, administrator, or assign, show cause why

process should not issue against him to repeal such patent. And if sufficient cause shall not be shown to the contrary, the rule shall be made absolute, and thereupon the said judge shall order process to be issued against such patentee, or his executors, administrators, or assigns, with costs of suit. And in case no sufficient cause shall be shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, judgment shall be rendered by such Court for the repeal of such patent ; and if the party, at whose complaint the process issued, shall have judgment given against him, he shall pay all such costs as the defendant shall be put to in defending the suit, to be taxed by the Court, and recovered in due course of law.

**Sec. 11.** That every inventor, before he presents his petition to the Secretary of State, signifying his desire of obtaining a patent, shall pay into the treasury thirty dollars, for which he shall take duplicate receipts ; one of which receipts he shall deliver to the Secretary of State, when he presents his petition ; and the money thus paid, shall be in full for the sundry services to be performed in the office of the Secretary of State, consequent on such petition, and shall pass to the account of clerk hire in that office. *Provided,* nevertheless, That for every copy, which may be required at the said office, of any paper respecting any patent that has been granted, the person obtaining such copy shall pay at the rate of twenty cents for every copy sheet of one hundred words ; and for every copy of a drawing, the party obtaining the same shall pay two dollars : of which payments an account shall be rendered annually, to the treasury of the United States ; and they shall also pass to the account of clerk hire in the office of the Secretary of State.

**Sec. 12.** That the act, passed the tenth day of April, in the year one thousand seven hundred and ninety, entitled "An act to promote the progress of useful arts," be, and the same is hereby, repealed. *Provided always,* That nothing contained in this act shall be construed to invalidate any patent that may have been granted under the authority of the said act ; and all patentees under the said act, their executors, administrators, and assigns, shall be considered within the purview of this act, in respect to the violation of their rights : *Provided,* such violations shall be committed after the passing of this act.

*Approved, February 21, 1793.*

### CHAPTER 179. [xxv.]

*An Act to extend the privilege of obtaining patents for useful discoveries and inventions, to certain persons therein mentioned, and to enlarge and define the penalties for violating the rights of patentees.*

**Sec. 1. Be it enacted, &c.** That all and singular the rights and privileges given, intended, or provided, to citizens of the United States, respecting patents for new inventions, discoveries and improvements,

by the act, entitled "An act to promote the progress of useful arts, and to repeal the act heretofore made for that purpose," shall be, and hereby are, extended and given to all aliens who, at the time of petitioning in the manner prescribed by the said act, shall have resided for two years within the United States, which privileges shall be obtained, used, and enjoyed, by such persons, in as full and ample manner, and under the same conditions, limitations and restrictions, as by the said act is provided and directed in the case of citizens of the United States. *Provided always,* That every person petitioning for a patent for any invention, art, or discovery, pursuant to this act, shall make oath or affirmation, before some person duly authorized to administer oaths, before such patent shall be granted, that such invention, art, or discovery, hath not, to the best of his or her knowledge or belief, been known or used, either in this, or any foreign country; and that every patent which shall be obtained pursuant to this act, for any invention, art, or discovery, which it shall afterwards appear had been known or used previous to such application for a patent, shall be utterly void.

Sect. 2. That where any person hath made, or shall have made, any new invention, discovery, or improvement, on account of which a patent might, by virtue of this or the abovementioned act, be granted to such person as shall die before any patent shall be granted therefor, the right of applying for and obtaining such patent, shall devolve on the legal representatives of such person, in trust for the heirs at law of the deceased, in case he shall have died intestate; but if otherwise, then in trust for his devisees, in as full and ample manner, and under the same conditions, limitations, and restrictions, as the same was held, or might have been claimed or enjoyed, by such person, in his or her life time; and when application for a patent shall be made by such legal representatives, the oath or affirmation, provided in the third section of the before mentioned act, shall be so varied as to be applicable to them.

Sec. 3. That where any patent shall be, or shall have been, granted pursuant to this or the above mentioned act, and any person, without the consent of the patentee, his or her executors, administrators, or assigns, first obtained, in writing, shall make, devise, use, or sell, the thing whereof the exclusive right is secured to the said patentee by such patent; such person, so offending, shall forfeit and pay to the said patentee, his executors, administrators, or assigns, a sum equal to three times the actual damage sustained by such patentee, his executors, administrators, or assigns, from or by reason of such offence, which sum shall and may be recovered, by action on the case, founded on this and the abovementioned act, in the Circuit Court of the United States having jurisdiction thereof.

Sect. 4. That the fifth section of the above mentioned act, entitled "An act to promote the progress of useful arts, and to repeal the act heretofore made for that purpose," shall be, and hereby is repealed.

*Approved, April 17th, 1800.*

## PRIORITY ACTS.

*Vide Constitutional Law II. (A) p. 81. Statutes of the United States VIII, p. 412.*

*Act of March 3, 1797. c. 368. [lxxiv.]*

**Sec. 5.** That where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied: and the priority hereby established, shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed.

*Act of March 2, 1799. c. 128. [cxxxviii.]*

**Sec. 65.** That where any bond for the payment of duties shall not be satisfied on the day it may become due, the collector shall, forthwith, and without delay, cause a prosecution to be commenced for the recovery of the money thereon, by action, or suit at law, in the proper court, having cognizance thereof, and in all cases of insolvency, or where any estate in the hands of the executors, administrators, or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any such bond or bonds, shall be first satisfied; and any executor, administrator, or assignee, or other person, who shall pay any debt due by the person or estate from whom, or for which, they are acting, previous to the debt or debts due to the United States, from such person or estate being first duly satisfied and paid, shall become answerable, in their own person and estate, for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid: and actions or suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognizance thereof: *Provided*, That in all cases in which suits or prosecutions shall be commenced for the recovery of duties, or pecuniary penalties, prescribed by the laws of the United States, the person or per-

sons against whom process may be issued, shall and may be held to special bail, subject to the rules and regulations which prevail in civil suits in which special bail is required : *And provided also,* That if the principal in any bond which shall be given to the United States for duties on goods, wares, or merchandise, imported, or other penalty, either by himself, his factor, agent, or other person for him, shall be insolvent, or if such principal being deceased, his or her estate and effects, which shall come to the hands of his or her executors, administrators, or assignees, shall be insufficient for the payment of his or her debts, and if, in either of the said cases, any surety on the said bond or bonds, or the executors, administrators, or assignees, of such surety, shall pay to the United States the money due upon such bond or bonds, such surety, his or her executors, administrators, or assignees, shall have and enjoy the like advantage, priority, or preference, for the recovery and receipt of the said moneys out of the estate and effects of such insolvent, or deceased principal, as are reserved and secured to the United States ; and shall and may bring and maintain a suit or suits, upon the said bond or bonds, in law or equity, in his, her, or their, own name, or names, for the recovery of all moneys paid thereon. And the cases of insolvency mentioned in this section, shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed, or absent debtor, shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed. And where suit shall be instituted on any bond, for the recovery of duties due to the United States, it shall be the duty of the court, where the same may be pending, to grant judgment at the return term, upon motion, unless the defendant shall, in open court, the United States' attorney being present, make oath or affirmation, that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified, in writing, to the collector of the district, prior to the commencement of the return term aforesaid ; whereupon, if the court be satisfied that a continuance, until the next succeeding term, is necessary for the attainment of justice, and not otherwise, a continuance may be granted until next succeeding term, and no longer. And on all bonds upon which suits shall be commenced, an interest shall be allowed, at the rate of six per cent. per annum, from the time when said bonds become due until the payment thereof.

## PRIZE ACT.

*Vide Constitutional Law II. (E) p. 85—87. Prize, p. 320. p. 326—329. p. 362. p. 368. p. 374. Statutes of the United States IX. (A) p. 416.*

## CHAPTER 430. [cvii.]

*An act concerning letters of marque, prizes, and prize goods.*

Sec. 1. Be it enacted, &c. That the President of the United States shall be, and he is hereby, authorized and empowered to revoke and annul at pleasure all letters of marque and reprisal which he shall or may at any time grant, pursuant to an act, entitled, "An act declaring war between the United Kingdom of Great Britain and Ireland, and the dependencies thereof, and the United States of America, and their territories."

Sec. 2. That all persons applying for letters of marque and reprisal, pursuant to the act aforesaid, shall state in writing the name, and a suitable description of the tonnage and force, of the vessel, and the name and place of residence of each owner concerned therein, and the intended number of the crew; which statement shall be signed by the person or persons making such application, and filed with the Secretary of State, or shall be delivered to any other officer or person who shall be employed to deliver out such commissions, to be by him transmitted to the Secretary of State.

Sec. 3. That before any commission of letters of marque and reprisal shall be issued as aforesaid, the owner or owners of the ship or vessel for which the same shall be requested, and the commander thereof, for the time being, shall give bond to the United States, with at least two responsible sureties, not interested in such vessel, in the penal sum of five thousand dollars; or if such vessel be provided with more than one hundred and fifty men, then in the penal sum of ten thousand dollars; with condition that the owners, officers, and crew, who shall be employed on board such commissioned vessel, shall and will observe the treaties and laws of the United States, and the instructions which shall be given them according to law for the regulation of their conduct; and will satisfy all damages and injuries which shall be done or committed contrary to the tenor thereof by such vessel, during her commission, and to deliver up the same when revoked by the President of the United States.

Sec. 4. That all captures and prizes of vessels and property shall be forfeited, and shall accrue to the owners, officers, and crews, of the vessels by whom such captures and prizes shall be made; and, on due condemnation had, shall be distributed according to any written agreement which shall be made between them; and if there be no such agreement, then one moiety to the owners, and the other moiety to the officers and crew, to be distributed between the officers and crew as nearly as may be, according to the rules prescribed

for the distribution of prize money, by the act, entitled "An act for the better government of the navy of the United States," passed the twenty-third day of April, one thousand eight hundred.

Sec. 5. That all vessels, goods, and effects, the property of any citizen of the United States, or of persons resident within and under the protection of the United States, or of persons permanently resident within and under the protection of any foreign prince, government, or state, in amity with the United States, which shall have been captured by the enemy, and which shall be recaptured by vessels commissioned as aforesaid, shall be restored to the lawful owners, upon payment by them, respectively, of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any Court having competent jurisdiction, according to the nature of each case, agreeably to the provisions heretofore established by law. And such salvage shall be distributed among the owners, officers, and crews, of the vessels commissioned as aforesaid, and making such recaptures, according to any written agreement which shall be between them; and in case of no such agreement, then in the same manner, and upon the principles hereinbefore provided, in case of capture.

Sec. 6. That, before breaking bulk of any vessel which shall be captured as aforesaid, or other disposal or conversion thereof, or of any articles which shall be found on board the same, such captured vessel, goods, or effects, shall be brought into some port of the United States, or into some port of a nation in amity with the United States, and shall be proceeded against before a competent tribunal, and, after condemnation and forfeiture thereof, shall belong to the owners and captors thereof, and be distributed as aforesaid: And in the case of all captured vessels, goods, and effects, which shall be brought within the jurisdiction of the United States, the District Courts of the United States shall have exclusive original cognizance thereof, as in civil causes of admiralty and maritime jurisdiction; and the said Courts, or the Courts, being Courts of the United States, into which such cases shall be removed, and in which they shall be finally decided, shall and may decree restitution, in whole or in part, when the capture shall have been made without just cause. And if made without probable cause, or otherwise unreasonably, may order and decree damages and costs to the party injured, and for which the owners and commanders of the vessels making such captures, and also the vessels, shall be liable.

Sec. 7. That all prisoners found on board any captured vessels, or on board any recaptured vessels, shall be reported to the collector of the port of the United States in which they shall first arrive, and shall be delivered into the custody of the marshal of the District, or some civil or military officer of the United States, or of any State in or near such port, who shall take charge of their safe-keeping and support, at the expense of the United States.

Sec. 8. That the President of the United States shall be, and he is hereby, authorized to establish and order suitable instructions for the better governing and directing the conduct of the vessels so commissioned, their officers and crews, copies of which shall be

delivered, by the collector of the customs, to the commanders, when they shall give bond as aforesaid.

Sec. 9. That a bounty shall be paid by the United States, of twenty dollars for each person on board any armed ship or vessel, belonging to the enemy, at the commencement of an engagement, which shall be burnt, sunk, or destroyed, by any vessel commissioned as aforesaid, which shall be of equal or inferior force, the same to be divided as in other cases of prize money.

Sec. 10. That the commanding officer of every vessel having a commission, or letters of marque and reprisal, during the present hostilities between the United States and Great Britain, shall keep a regular journal, containing a true and exact account of his daily transactions and proceedings with such vessel and the crew thereof; the ports and places he shall put into or cast anchor in, the time of his stay there, and the cause thereof; the prizes he shall take; the nature and probable value of such prizes; the times and places when and where taken, and how and in what manner he shall dispose of the same; the ships or vessels he shall fall in with; the times and places, when and where he shall meet with them, and his observations and remarks thereon; also of whatever else shall occur to him or any of his officers or mariners, or be discovered and found out by examination or conference with any mariners or passengers of or in any other ships and vessels, or by any other ways or means whatsoever, touching or concerning the fleets, vessels, and forces, of the enemy, their posts and places of station and destination, strength, numbers, intents, and designs: And such commanding officer shall, immediately on his arrival in any port of the United States, or the territories thereof, from or during the continuance of any voyage or cruise, produce his commission for such vessel, and deliver up such journal so kept as aforesaid, signed with his proper name and hand writing, to the collector or other chief officer of the customs, at or nearest to such port; the truth of which journal shall be verified by the oath of the commanding officer for the time being; and such collector or other chief officer of the customs shall, immediately on the arrival of such vessel, order the proper officer of the customs to go on board and take an account of the officers and men, the number and nature of the guns, and whatever else shall occur to him, on examination, material to be known; and no such vessel shall be permitted to sail out of port again, after such arrival, until such journal shall have been delivered up, and a certificate obtained, under the hand of such collector or other chief officer of the customs, that she is manned and armed according to her commission; and upon delivery of such certificate, any former certificate of a like nature, which shall have been obtained by the commander of such vessel, shall be delivered up.

Sec. 11. That captains and commanders of vessels having letters of marque and reprisal, in case of falling in with any of the vessels of war or revenue of the United States, shall produce, to the commanding officer of such vessels, their journals, commissions, and certificates, as aforesaid; and the commanding officers of such ships of war or revenue shall make, respectively, a memorandum in such journal, of the day on which it was so produced to him, and shall

subscribe his name to it: and, in case such vessel, having letters of marque as aforesaid, shall put into any foreign port where there is an American consul, or other public agent of the United States, the commander shall produce his journal, commission, and certificate aforesaid, to such consul or agent, who may go on board and number the officers and crew, and examine the guns, and if the same shall not correspond with the commission and certificate, respectively, such consul or agent shall forthwith communicate the same to the Secretary of the Navy.

Sec. 12. That the commanders of vessels having letters of marque and reprisal as aforesaid, neglecting to keep a journal as aforesaid, or wilfully making fraudulent entries therein, or obliterating any material transactions therein, where the interest of the United States is in any manner concerned, or refusing to produce such journal, commission, or certificate, pursuant to the preceding section of this act, then, and in such cases, the commissions or letters of marque and reprisal of such vessels shall be liable to be revoked; and such commanders, respectively, shall forfeit, for every such offence, the sum of one thousand dollars; one moiety thereof to the use of the United States, and the other to the informer.

Sec. 13. That the owners or commanders of vessels having letters of marque and reprisal as aforesaid, who shall violate any of the acts of congress for the collection of the revenue of the United States, and for the prevention of smuggling, shall forfeit the commission or letters of marque and reprisal, and they, and the vessels owned or commanded by them, shall be liable to all the penalties and forfeitures attaching to merchant vessels in like cases.

Sec. 14. That so much of any act or acts as prohibits the importation of goods, wares, and merchandise, of the growth, produce, and manufacture, of the dominions, colonies, and dependencies of the United Kingdom of Great Britain and Ireland, or of goods, wares, and merchandise, imported from the dominions, colonies, and dependencies, of the United Kingdom of Great Britain and Ireland, be, and the same is hereby, repealed, so far as the same may prohibit the importation or introduction into the United States, and their territories, of such goods, wares, and merchandise, as may be captured from the enemy, and made good and lawful prize of war, either by vessels having letters of marque and reprisal, or by the vessels of war and revenue of the United States. And all such goods, wares, and merchandise, when imported or brought into the United States, or their territories, shall pay the same duties, to be secured and collected in the same manner, and under the same regulations, as the like goods, wares, and merchandise, if imported in vessels of the United States from any foreign port or place, in the ordinary course of trade, are now, or may at the time be, liable to pay.

Sec. 15. That all offences committed by any officer or seaman on board any such vessel having letters of marque and reprisal, during the present hostilities against Great Britain, shall be tried and punished in such manner as the like offences are or may be tried and punished when committed by any person belonging to the public

ships of war of the United States: Provided always, That all offenders who shall be accused of such crimes as are cognizable by a Court Martial, shall be confined on board the vessel in which such offence is alleged to have been committed, until her arrival at some port in the United States, or their territories; or until she shall meet with one or more of the public armed vessels of the United States abroad, the officers whereof shall be sufficient to make a Court Martial for the trial of the accused; and upon application made, by the commander of such vessel, on board of which the offence is alleged to have been committed, to the Secretary of the Navy, or to the commander or senior officer of the ship or ships of war of the United States abroad as aforesaid, the Secretary of the Navy, or such commander or officer, is hereby authorized to order a Court Martial of the officers of the navy of the United States, for the trial of the accused, who shall be tried by the said Court.

Sec. 16. That an act, entitled "An act laying an embargo on all the ships and vessels in the ports and harbours of the United States, for a limited time," passed the fourth day of April, one thousand eight hundred and twelve; and an act entitled "An act to prohibit the exportation of specie, goods, wares, and merchandise, for a limited time," passed April fourteenth, one thousand eight hundred and twelve, so far as they relate to ships and vessels having commissions or letters of marque and reprisals, or sailing under the same, be, and they hereby are, respectively, repealed.

Sec. 17. That two per centum on the nett amount (after deducting all charges and expenditures) of the prize money arising from captured vessels and cargoes, and of the nett amount of the salvage of vessels and cargoes recaptured by the private armed vessels of the United States, shall be secured and paid over to the collector, or other chief officer of the customs, at the port or place in the United States at which such captured or recaptured vessels may arrive; or to the consul, or other public agent of the United States, at which such captured or recaptured vessels may arrive. And the money arising therefrom shall be held, and hereby is pledged by the government of the United States, as a fund for the support and maintenance of the widows and orphans of such persons as may be slain, and for the support and maintenance of such persons as may be wounded and disabled, on board of the private armed vessels of the United States, in any engagement with the enemy, to be assigned and distributed in such manner as shall hereafter by law be provided.

*Approved, June 26th, 1812.*

**SALVAGE ACT.***Vide Prize VIII. p. 358—362.***CHAPTER 168. [xiv.]***An Act providing for salvage in cases of recapture.*

**Sec. 1. Be it enacted, &c.** That when any vessel, other than a vessel of war or privateer, or when any goods which shall hereafter be taken as prize by any vessel, acting under authority from the government of the United States, shall appear to have before belonged to any person or persons, resident within, or under the protection of, the United States, and to have been taken by an enemy of the United States, or under authority, or pretence of authority, from any prince, government, or state, against which the United States have authorized, or shall authorize, defence or reprisals, such vessel or goods not having been condemned as prize by competent authority before the re capture thereof, the same shall be restored to the former owner or owners thereof, he or they paying for, and in lieu of, salvage, if retaken by a public vessel of the United States, one-eighth part, and if retaken by a private vessel of the United States, one-sixth part, of the true value of the vessel or goods so to be restored, allowing and excepting all imposts and public duties to which the same may be liable. And if the vessel so retaken, shall appear to have been set forth and armed as a vessel of war, before such capture, or afterwards, and before the retaking thereof, as aforesaid, the former owner or owners, on the restoration thereof, shall be adjudged to pay, for and in lieu of salvage, one moiety of the true value of such vessel of war, or privateer.

**Sec. 2.** That when any vessel or goods, which shall hereafter be taken as prize, by any vessel acting under authority from the government of the United States, shall appear to have before belonged to the United States, and to have been taken by an enemy of the United States, or under authority, or pretence of authority, from any prince, government, or state, against which the United States have authorized, or shall authorize, defence or reprisals, such public vessel not having been condemned as prize, by competent authority, before the capture thereof, the same shall be restored to the United States. And for and in lieu of salvage, there shall be paid from the treasury of the United States, pursuant to the final decree which shall be made in such case, by any Court of the United States, having competent jurisdiction thereof, to the parties who shall be thereby entitled to receive the same, for the recapture as aforesaid, of an unarmed vessel, or any goods therein, one sixth part of the true value thereof, when made by a private vessel of the United States, and one-twelfth part of such value when the recapture shall be made by a public armed vessel of the United States; and for the recapture, as aforesaid, of a public armed vessel, or any goods

therein, one moiety of the true value thereof, when made by a private vessel of the United States, and one-fourth part of such value when such recapture shall be made by a public armed vessel of the United States.

Sec. 3. That when any vessel or goods, which shall be taken as prize, as aforesaid, shall appear to have before belonged to any person or persons permanently resident within the territory, and under the protection of any foreign prince, government or state, in amity with the United States, and to have been taken by an enemy of the United States, or by authority, or pretence of authority, from any prince, government, or state, against which the United States have authorized, or shall authorize, defence or reprisals, then such vessel or goods shall be adjudged to be restored to the former owner, or owners thereof, he or they paying, for and in lieu of salvage, such proportion of the true value of the vessel or goods so to be restored, as, by the law or usage of such prince, government, or state, within whose territory such former owner or owners shall be so resident, shall be required; on the restoration of any vessel or goods of a citizen of the United States, under like circumstances of recapture, made by the authority of such foreign prince, government, or state; and where no such law or usage shall be known, the same salvage shall be allowed as is provided by the first section of this act: *Provided*, That no such vessel or goods shall be adjudged to be restored to such former owner or owners, in any case where the same shall have been, before the recapture thereof, condemned as prize by competent authority, nor in any case where, by the law or usage of the prince, government, or state, within whose territory such former owner or owners shall be resident, as aforesaid, the vessel or goods of a citizen of the United States, under like circumstances of recapture, would not be restored to such citizen of the United States: *Provided, also*, That nothing herein shall be construed to contravene, or alter, the terms of restoration in cases of recapture, which are, or shall be, agreed on in any treaty between the United States and any foreign prince, government, or state.

Sec. 4. That all sums of money which may be paid for salvage, as aforesaid, when accruing to any public armed vessel, shall be divided to and among the commanders, officers, and crew thereof, in such proportions as are or may be provided by law, respecting the distribution of prize-money. And when accruing to any private armed vessel, shall be distributed to and among the owners and company concerned in such recapture, according to their agreements, if any such there be; and in case there be no such agreement, then to and among such persons, and in such proportions, as the Court having jurisdiction thereof shall appoint.

Sec. 5. That such parts of any acts of congress of the United States, as respect the salvage to be allowed in cases of recapture, shall be, and are hereby repealed, except as to cases of recapture made before the passing of this act.

*Approved, March 3, 1800.*

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OR  
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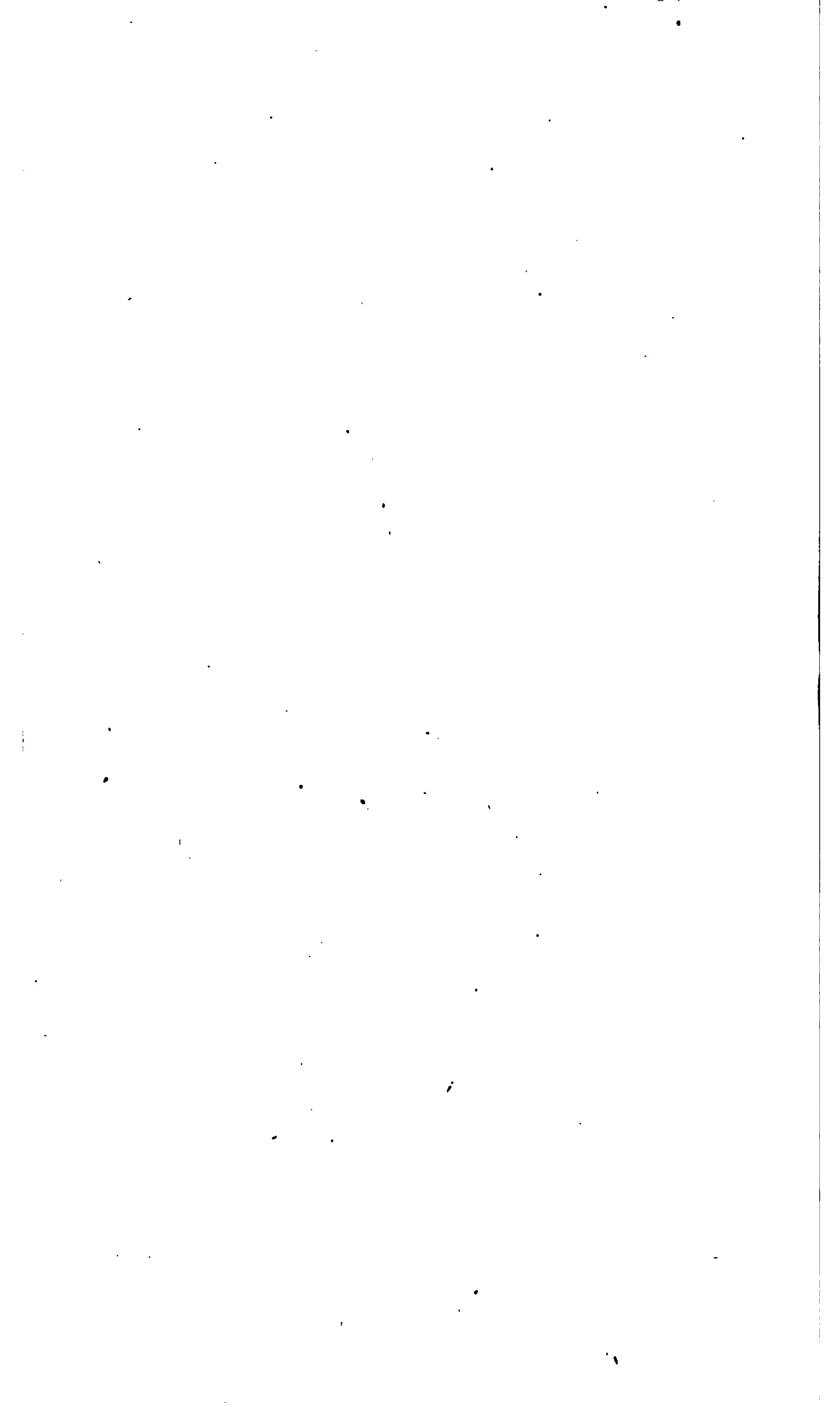
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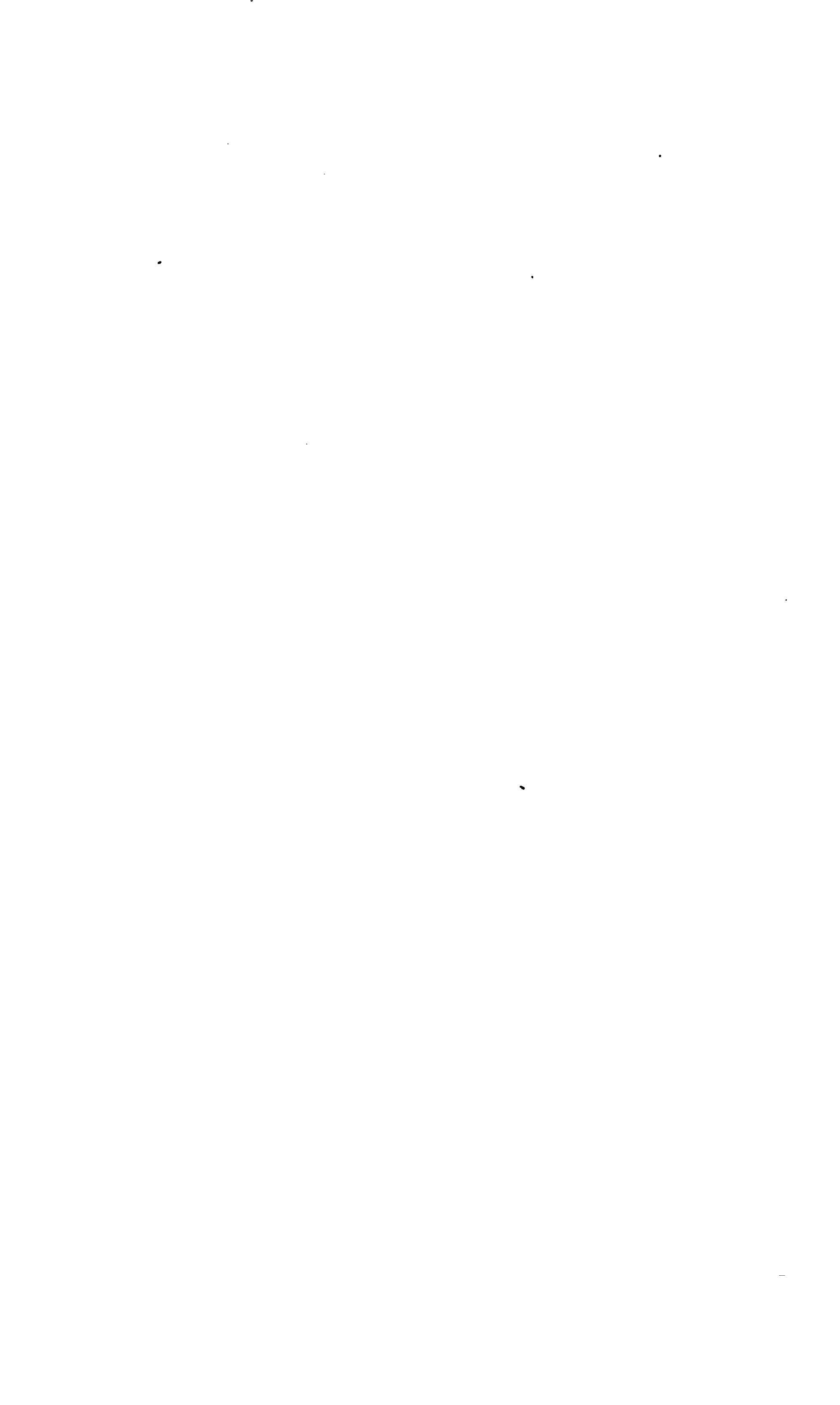
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